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E. D. WHITE

CYCLOPEDIA OF LAW

Principles

OF THE

Law of Real Property

AND THE

Law of Pleading and Practice at Common Law

VOL. X

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LAW OF REAL PROPERTY.

CHAPTER I.

THE EARLY HISTORY OF PROPERTY.

Sec. 1431.* CLASSES OF PROPERTY—MOVABLE AND IMMOVABLE.—In the infancy of civilization property consisted almost solely of visible and tangible articles, such as cattle, sheep, buildings and land, now termed *corporeal*, as distinguished from *incorporeal* property, as debts, rights in action, and the like, so common to modern civilization. Of tangible, or corporeal property, there are plainly two classes: thus we have, sheep, cattle, and articles that may be transported from place to place, or consumed, on the one hand; and land, houses, and the like, which are permanent and stationary in character; or *movable* and *immovable* property. This division of property into movable and immovable was made in the early years of our civilization and continues one of the most fundamental classifications of property, and to which the history of the Anglo Saxon race has added many important circumstances.**

*This book is No. 10 of The Cyclopedia of Law, the former 1,430 sections comprise the first nine books of the Series.

**Williams, Real Prop. 1, 2.

Our American law of real property is that of England, which our forefathers brought to this country in colonial times, and which became so firmly rooted that but few changes, and these chiefly statutory, have been made. A few principles of the English law, such as entails and the principles of primogeniture, being contrary to our system of government, soon died out, or were legislated away.

The history of real property in England has much to do with the rise, development, and fall of feudalism, and it therefore becomes important that the student should investigate to some extent the principles and characteristics of a system which, though it has passed away, has left its markings on our legal system.*

*The feudal system was first established by the Goths and Vandals when they overran and subdued Rome. Under this system land was made the basis of government, and all land was regarded as held by the king. As these barbarian hordes came down from the north of Europe they took possession of all property, both real and personal, belonging to those they subdued. The king, or chief, divided the property among his followers; the real property, or land, was not given to them outright, but was allotted to the chief men and soldiers, in large parcels, which "allotments were called *feoda*, feuds, fiefs, or fees: which last appellation in the northern language signifies a conditional stipend or reward." (2 Bl. Com. 45.) The condition annexed to these holdings was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given, to do which the holder had to take an oath of fealty, and on failure of the condition the lands again reverted to the chief or king who had granted them. The chief men to whom the large tracts were given, called tenants in capita, again divided the

By the Norman Conquest of England, in 1066, the lands formerly owned by the Saxons were for the most part confiscated, and re-granted by William the Conqueror to his soldiers under the principles of the feudal system, that is, the lands instead of being held freely, or as allodial lands, were held under a sort of rental, consisting in the performance of military service to the immediate superior of the holder, until such service reached the king, or lord paramount, who was deemed to be the owner of all the land. This system was soon applied to all the lands in England, both those confiscated and those that were allowed to remain in the hands of their former Saxon owners.* So that in a short time after the Norman Conquest, the principle became firmly established, that there were no free lands, but that all lands were mere holdings, tenures (from *tenir*, to hold), or estates subject to the claims of the lord paramount or king, in whom the title, and right of disposition rested. This idea, that property in land is a mere holding or estate, has clung to our real property law ever since, so that today, title to land is not absolute, the owner only having an estate therein.**

land among his immediate followers on the same principles, granting the use of the land, while reserving the title, the same relation as to rendering military service or returns for the land being kept up as between the king and tenant in capita. (2 Bl. Com. 45, 48; Wright's Tenures, 61, 62.)

*Williams, Real Prop. 4; Stubbs, Const. Hist. Eng. Vol. 1, Ch. ix.

**Williams, Real Prop. 17. Estate, or in Latin, *status*,

The system of tenures, or holdings, established under the feudal system, only applied to land, or immovable property; sheep and cattle and other movable property were not of sufficient importance, or were too easily disposed of to bring under the system, and their control and ownership by individuals was regarded as absolute.*

"Lands, houses, and immovable property,—things capable of being held in the way above described,—were called *tenements* or *things held*. They were also denominated *hereditaments*, because, on the death of the owner, they devolved by law to his heir. So that the phrase, *lands, tenements, and hereditaments*, was used by the lawyers of those times to express all sorts of property of the first or immovable class; and the expression is in use to the present day."** The other class of property, *movable*, was designated as goods or chattels, terms still in common use.

Sec. 1432. ORIGIN OF THE TERMS "REAL PROPERTY" AND "PERSONAL PROPERTY."
—Under the feudal system land was known by the name of *tenements* and this designation maintained until the feudal system began to decline, commercial systems to spring up, and the growth of liberty among the people demanded a change in the ideas prevail-

signifying the condition or circumstances in which the owner stands with regard to his property.

*Co. Litt. 191a, n.

**Williams, Real Prop. 5.

ing as to the ownership of land. The final blow at the feudal system was not given until the restoration of Charles II, when a statute abolished most of the forms of tenures theretofore existing and simplified the law as to land, though the old forms still remained. This statute (12 Car. II, c. 24) abolished tenures by knight service and many of the feudal restraints upon alienation of land, and reduced nearly all tenures to free and common socage, by which was meant tenure by rendering some conventional service not military. And it was upon such a grant that the land in most of the American colonies was given to the colonists by the king, simply recognizing the doctrine of fealty.*

As the feudal system passed away, and disputes over the right to the possession of land arose between the lord and tenant, another important distinction between land and chattels became apparent, the *real* land could be restored in an action at law, while in the case of goods the remedy was usually against the person who had taken and disposed of them. So that, growing out of the remedy applicable to the recovery of the two sorts of property, and the actions therefore, *real* actions, and *personal* actions, land and tenements came to be called *real property*, and goods and chattels *personal property*.**

*Wright's Tenures, 142; Williams, Real Prop. 6n.

**2 Bl. Com. 16,384; 3 Id. 144.

Sec. 1433. OF THE DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY.—The terms *real property* and *personal property* are now more common than the ancient designations; while the latter class has grown into almost as much importance as the former. Many sorts of property which are in a way fixed and immovable, as shares of stock in railways, are yet personal property, while following the old system, titles of honor are considered as real property since in ancient times they were annexed to the ownership of certain lands.* On the contrary, a lease of lands or houses for a term of years, was, and is, considered as personal property, since the tenant's possession, though for a long term of years did not make him the owner of the land, or make the tenant liable to any of the feudal dues exacted from those holding by other grants, or descend to his eldest son as heir at law, but was merely a chattel interest to the use of the land.**

Another distinction between real and personal property coming down from feudal times is, that on the death of the owner intestate, the real property goes to his heir, while personal property is distributed by the administrator among the *next of kin* of the intestate, or, under modern statutes, the personal property is first taken to pay debts and obligations, while the real property goes to the heirs, unless necessary to pay debts.

*1 Hallam's Middle Ages, 158; Williams, Real Prop. 8.

**Co. Litt. 46 a; Williams, Real Prop. 9.

Sec. 1434. CORPOREAL AND INCORPOREAL PROPERTY.—In addition to the classification of property into movable and immovable, personal and real, there is another division also to be noted, that of *corporeal* and *incorporeal*. By corporeal property is meant visible and tangible property, as a house, a parcel of land, chattels, and the like; while an annuity, or annual rents derived from land, is incorporeal property, since it has only a mental existence, is intangible, invisible, and only exists in contemplation of law. In ancient times writing was not commonly employed, as very few people could write, so that the distinction between these two classes of property became important in the manner of their transfer. Corporeal and tangible property was delivered from one to another by actual transfer (livery of seizin), or by a symbolical delivery in the case of land or bulky articles; while a transfer of incorporeal property, not being capable of this actual transfer in the presence of witnesses, had to be made in writing.* It is with corporeal property, and that class of it known as real

*Things incorporeal were anciently said to *lie in grant*, while corporeal hereditaments were said to *lie in livery*. 2 Bl. Com. 20; Co. Litt. 9 a. Under the old common law *seizin* was regarded as the evidence of ownership, and no transfer of title to land was regarded as good until livery of seizin was made to the alienee. So that a deed to land without livery of seizin passed no title, while if livery of seizin was made it was a good transfer, because of the notoriety of the transfer, without any deed. Gilbert on Tenures, 77.

property or hereditaments, since it descends to the heir on the death of the owner that we are now concerned.

Sec. 1435. OTHER TERMS USED TO DESIGNATE CORPOREAL HEREDITAMENTS, OR LAND.—A number of words and phrases that have come to have general significance and meaning, and are commonly used in the law of real property need some explanation to enable the student to comprehend their meaning. The word *messuage* is used by the profession the same as house, and while formerly considered as having a more comprehensive meaning, they are now deemed nearly synonymous, each comprising not only buildings, but also outbuildings, the orchard, curtilage, and perhaps the garden surrounding the house, when used in a legal instrument.*

The word *tenement* is also used in law to designate a house, and is the regular synonym following the word *messuage* in a lease, but whenever the sense requires it will be given a more comprehensive meaning, including land generally.**

The word *land*, in its legal signification, includes all soil or earth generally, but in its strict and primary import it referred to arable land. But in our law it includes everything attached to it or constructed upon it, as houses, bridges, buildings of every description; and a grant of a parcel of land carries with it not only

*Williams, Real Prop. 13; 27 Beav. 242; *Smithson v. Cage*, Cro. Jac. 526.

**2 Bl. Com. 16, 17, 59.

the things upon the surface of the land, but also everything above and below the surface, from the center of the earth to the highest heavens, the maxim being, *cujus est solum, ejus est usque ad coelum*.^{*} So that a pond of water passes with the land as land covered by water, and the mines and minerals below the surface pass with a grant of the land, except gold and silver, which from immemorial times were claimed by the crown.^{**} But this exception does not prevail in America.^{***}

^{*}Williams, Real Prop. 14.

^{**}1 Inst. 4 a; Case of mines, Plowd. 313. In the last case it was said that "the common law which is founded upon reason, appropriates everything to the persons whom it best suits; as common and trivial things to the common people; things of more worth to persons of a higher and superior class, and things most excellent to persons who excel all others; and because gold and silver are the most excellent things which the soil contains, the law has appointed them, as in reason it ought, to the person most excellent, and that is the king." A most remarkable line of reasoning!

^{***}In most of the royal charters to the colonies, "all mines" were expressly included in the grants, with a reservation in some cases of a fourth or fifth of gold and silver ores.

The rights of owners of mines in America are governed by the rules of the common law, but the reservation to the state of the precious metals never obtained in this country to any extent. The right to such mines on the public lands in California is held to be vested in the United States merely as an incident to the ownership of the soil and not by any sovereign prerogative. The States of Pennsylvania and New York, by statute assert prerogative rights over mines to the extent of the English rule. Williams, Real Prop. 3; Kent Com. 378n; *Boggs v. Merced Co.*, 14 Cal. 375-6.

The extensive meaning of the term *land* may be limited and controlled by the context, as where the term is used in plain contradistinction to houses, it will not include them. And minerals under land may be expressly excepted so as not to pass by a grant of the land, in which case the reservation would include incidentally the right to use the land to get out the minerals, and the duty to leave sufficient support for the land.*

The word *premises* is commonly used in law as meaning what has gone before, as, where certain facts have been recited in an instrument, and then follows, "in consideration of the *premises*," this means in consideration of the facts just stated. The word is not commonly used as designating property, unless a description has preceded its use in the same instrument.**

Sec. 1436. AUTHORITIES ON THE LAW OF REAL PROPERTY.—As our real property law is largely that of England, it follows that the books by English authors would be of authority here, and we have many English works, which with American notes are in common use. Among these we may mention the work by Joshua Williams, which has reached its 6th American edition and is a very useful compendium of real property law; and *The History of Real Property*,

*Jarman on Wills, (4th ed.) 777; *Earl of Cardigan v. Armitage*, 2 B. & C. 197; *Livingstone v. Moingona Coal Co.*, 49 Ia. 369; *Yandes v. Wright*, 66 Ind. 319.

**Williams, *Real Prop.* 15.

by Professor Digby, a book of great value to the person who desires to get to the very bottom of the subject. Washburn's treatise on the law of Real Property, in three volumes, is an exhaustive and authoritative work. Bingham's Law of Real Estate is another three volume work. In addition to these authorities the student will find it necessary to read the statutes of his State to ascertain what changes, if any, have been made in the common law as to real property, and these statutes along with the leading decisions which may be found in such works as the Lawyers' Reports Annotated, will equip him not only for admission to the bar, but for actual practice of the law.

Note.—In the early history of the Saxon people, land was for the most part owned by the people in common. The only property that was not subdivided among the people generally to be held in common, was that actually occupied by the residence of the family. Thus, if a person built a house the land occupied by the house was regarded as his property, and was not subject to be divided. But the fields outlying the villages were held in common and divided from time to time among the people, as was done in Russia until quite recent times. These lands were then cultivated by the person to whom they were given. This was the system prevailing in England some time prior to the Norman Conquest.

At the time of the conquest of England by William, most of the land outside of the cities and towns was divided up into manors held by the crown and tenants in capita, for many of the feudal principles were introduced prior to the conquest by William. After the Norman conquest the feudal system was made to apply to all lands in England.

These manors held by the Danish earls contained from three to ten thousand acres, and were divided into acre strips. They were first divided into three great fields, in order that the tenants might have three fields. These fields were again

divided into acre strips, four rods wide and forty rods long. For convenience in plowing these strips were made forty rods long, this being the distance the oxen could plow without stopping to rest. It was called a furrow-long, or furlong. Why the strips were four rods wide does not appear. Between each of the acre strips was a little space of uncultivated land which was allowed to grow up in weeds, brush and grass, and these strips were to be seen in England for a thousand years or more.

The acre strips were portioned out to the villeins, by which was meant a person not a freeman, and from which word is derived our term villain, or person of bad repute. These tenant farmers occupied the same relation to the lord of the manor as the Russian serfs down to the time of Nicholas. Each villein was apportioned thirty acres to farm, ten acre strips in each of the three large fields, and these strips were not adjoining. In cultivating the land the villeins worked together. Each was obliged to keep two oxen for a team, which he could not sell without the consent of the lord of the manor. The villein formed an agreement with three others so as to have a full team with which to plow the land, and in the plowing each had his particular work to do, and the man holding the plow was obliged to plow his neighbor's land as well as he did his own.

When William the Conquerer ascended the English throne, over one thousand of these manors became his by right of succession. In addition to these crown estates, the estates of the nobles who opposed him, were confiscated and went to the king as lord paramount. These estates were granted by William to his military followers. These chief soldiers took the estates as they were left by their predecessors, so that in many cases the actual occupants of the land were not disturbed in their possession, but there was simply a change of masters. The lands of the church were left undisturbed, and also the manors of some of the nobles who had not opposed William.

In 1085, one year before the Domesday survey, all of the great landholders met the king at Salisbury Plains and took oath of fealty or homage, which was an acknowledgment

that they held their lands from William as lord paramount. And from that day to this it is the theory of the English law that all title to land is derived immediately from the crown, and that there is no valid title unless the grant can be traced back to the crown.

The Domesday survey was an assessment or inventory of all the real property made by William the Conqueror twenty years after the battle of Hastings, in order to ascertain the holdings and value of the various manors. In the first place commissioners were appointed by the king to go through the country and visit the various manors, and ascertain their size, the owner thereof, and from whom he derived title; also the number of acres of pasture land, woodland, and waste land, and the fisheries. The assessors also ascertained the number of freemen on the manors, cottagers and villeins, and in effect made a general assessment of all the property in England. From this data, called the Domesday book, the king was able to fix the returns he should receive from the holders of the manors.

This land in the manors, under the feudal system was held by military tenure, there being no taxes levied by the king, except directly on the tenants in capita, who were obliged to make certain returns to the king in the way of military service and equipment; thus to serve the king at least forty days in the year, and when so doing furnish all his arms, equipment, horses and provisions, and this was his return, or rent, for the use of the land. The amount of service and quantity of supplies to be furnished was also fixed in proportion to the amount of land held by the various tenants in capita. The relation established between the king and the tenants in capita, was again established between the lords of the manors and their tenants. The tenant could not alienate the land, but he could grant it to another upon the same terms he had received it; this was called sub-infeudation.

All persons who did not hold land were obliged to attach themselves to some one who did, for the purpose of obtaining their protection.

It was an age of profound ignorance, so far as knowledge of writing was concerned. There was not one in ten thousand who could read or write, a knowledge of learning being con-

fined entirely to the clergy. Many of the barons could neither read or write. As a result of this ignorance, seeing and hearing had to be relied upon rather than writing. The barons could not read, but they could recognize an impression made by their seal upon wax. Hence they carried a seal upon a ring, which they attached to all documents, that they might recognize them as their own. This use of a seal became so customary that it has maintained ever since, but is now gradually giving place, and is not of much importance in the execution of documents.

Three times a year the king sat in his court composed of the great barons of the household and the bishops of the church, and the tenants of the land were obliged to appear and kneel before the king and take the oath of allegiance. Having taken the oath, the king threw upon him the robe of office, and this was called his investiture; that is, they were invested, or actually clothed with the land. This ceremony of taking the oath of fealty and investiture as between the king and tenants in capita, was again performed as between the chief tenants and their sub-tenants. After the ceremony of allegiance or fealty the tenant was actually put in possession of the land by livery of seizin, which was performed by the lord and tenant going upon the premises, and there in the presence of witnesses the lord would deliver to the tenant a tuft of grass or twig from the land, and declare the tenant to be in possession of all the land then granted to him; this ceremony taking the place of, and being considered of more importance than the execution of a deed. See, Freeman's Norman Conquest, Ch. xvii.; Stubbs' Const. Hist. Sec. 95; Digby's Hist. of Real Property, Chapters 1, 2; 2 Bl. Com. Ch. iv; Williams, Real Prop. Ch. 1.

CHAPTER II.

OF AN ESTATE FOR LIFE.

Sec. 1437. ORIGIN OF AN ESTATE FOR LIFE.

—It is said by Blackstone and other writers that fees or estates were originally held at the will of the lord, and rose by degrees, through the stages of leases for years and for life, to the dignity of inheritances.* But Williams, in his work on Real Property, claims that an estate for life seems to have been the smallest estate in the conquered lands which the military tenant was disposed to accept.** This estate could not be sold by the tenant without the consent of the lord of the manor. So that a grant of land to A, was simply a grant for his life, and nothing further. It being an early established principle in feudal grants, that they were not to be extended beyond the express terms of the gift, but were to be construed strictly, and such lands on the death of the life tenant reverted to the grantor.***

If a grant was to be of a greater estate than for life, it was necessary to show such intent that the descendants of the tenant were to succeed him, as by granting the land to "A and his heirs," or by other words show-

*2 Bl. Com. 57.

**Williams, Real Prop. 17.

***Wright's Tenures, 29; 152.

ing such an intention. At first, in such a grant the heir took from the grantor since he was named in the original grant, and not from his ancestor. Hence it was said, "the ancestor and the heirs took equally as a succession of usufructuaries, each of whom during his life enjoyed the beneficial, but none of whom possessed, or could lawfully dispose of, the direct or absolute dominion of the property."*

The feudal system did not long prevent the alienation of landed property, and by the statute of *Quia Emptores* (18 Edw. I, c. 1), the right of every freeman to dispose of his lands, or part of them, was expressly sanctioned, and at a later period by statute (32 Henry VIII, c. 1), the power to dispose of an estate in fee simply by will was sanctioned. This enlargement of the rights of the owner of land to dispose of same by devise and will continued until now there are no restrictions on the right of the owner of land to dispose thereof.** And the rule of construction followed in feudal times has been changed so that a grant of land is to be construed most strongly against the grantor, with the exception, coming down from feudal times, that a grant to A, simply, conveys but a life estate, and it is as necessary now, as it was in ancient

*Co. Litt. 191 a, n; *Burgess v. Wheate*, 1 Wm. Bl. 133.

**The statute of *Quia Emptores* abolished sub-infeudation, declaring "that from henceforth it shall be lawful to every freeman to sell of his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and custom as his feoffor held before."

times, to use the word heirs, if more than a life estate is to be granted. It is said that ignorance of this rule of law has served to defeat the intentions of many unlearned devisors. The rule has been modified by statute in many of the States of the Union, the words of inheritance being dispensed with by a provision that every conveyance passes the entire estate of the grantor, unless a contrary intent appears or can be implied from the deed.*

Sec. 1438. OF AN ESTATE *per autre vie*.—When the owner of an estate for life sold his interest to another, the new owner had an estate for the life of his grantor, and this in Norman French was called an estate *per autre vie*, and the person for whose life the land is held is called the *cestui que vie*. Unless the grant to the new owner included his heirs, if he died before the *cestui que vie*, the land was left without an occupant while the life of the latter continued, as the

*“Generally speaking, no common person has the smallest idea of any difference between giving a horse and a quantity of land. Common sense alone would never teach a man the difference; but the distinction which is now clearly established, is this: If the words of the testator denote only a *description* of the *specific estate* or *land* devised, in that case, if no words of limitation are added, the devisee has only an estate for *life*. But if the words denote the *quantum* of *interest* or property that the testator has in the lands devised, then the *whole* extent of such his *interest* passes by the gift to the devisee. The question, therefore, is always a question of construction, upon the words and terms used by the testator.” Per Lord Mansfield, in *Hogan v. Jackson*, Cowp. 306.

law would not allow the *cestui que vie* to re-enter after having disposed of his estate. Under these circumstances any one might enter on the land, and the one so entering was called a *general occupant*. But if the life estate held by A had been granted to "B and his heirs", the estate at the death of B would go to his heir until the demise of A, and such heir was designated a *special occupant*, since he had a special right of occupation by the words of the grant. To remedy this defect, a special clause in the Statute of Frauds (29 Car. II, c. 3, s. 12) was inserted, giving the owner of an estate *per autre vie* the right to dispose of it by will, and in case he made no will, and the estate was not one that would go to his heir, providing that it should go to his executors or administrators. The like statutes and others have been adopted in many of the United States, so that in this country an estate *per autre vie* is regarded as the real property of a decedent and becomes liable for the payment of his debts.*

Sec. 1439. INCIDENTS OF AN ESTATE FOR LIFE—MEANING OF FREEHOLD ESTATE.—The owner of an estate for life, designated as a tenant for life, was simply a *holder* of the land by feudal principles. Such an estate, as well as an estate *per autre vie* was regarded as a *freehold* estate, since it was regarded as the least estate worthy the acceptance of a *freeman*—one holding such an estate was known as a

*For other obsolete provisions in regard to such estates see Williams, Real Prop. 20, 22.

free-holder, and was entitled to certain rights and privileges not common to others, as to be summoned on juries and vote for certain shire officers.* This distinction as to freeholders still maintains in some of the states. These life estates at common law were not only terminable by the natural death of the tenant, but also by his outlawry, or civil death on entering a monastery.

The tenant for life had the right to cut wood for fuel and for use in his husbandry, repairing the buildings, fences, etc. But he could not cut timber unnecessarily, or commit *waste* by the wilful destruction of any part of the premises, called *voluntary waste*, or by negligence permit the buildings to go to ruin, called *permissive waste*. The common law decisions as to what constitutes waste on the part of such a tenant do not always apply in this country, as because of our forests and other dissimilar conditions it might be advisable to cut standing timber in order to clear the ground for farming.** At common law the life tenant could not plough up ancient meadow, or dig gravel, brick or stone, except in such pits as had theretofore been open and used, neither could he open new mines for coal or minerals, and if he did so it was held to constitute voluntary waste.***

*Cruise on Real Prop. I, 61.

**Wilkinson v. Wilkinson, 59 Wis. 557; Stout v. Dunning, 72 Ind. 343; Keeler v. Eastman, 11 Vt. 293; Woodward v. Gates, 38 Ga. 212.

***Simmons v. Norton, 7 Bing. 648; Viner v. Vaughan, 2 Beav. 466; Co. Litt. 54 b.

A tenant for life could of course not lease or grant his holding to endure beyond his lifetime, unless such a power was given in his deed, and up to 1845, in England, an attempt so to do caused a forfeiture of his estate to the person next entitled. Crops sown by the tenant for life may be gathered by his executors as emblements, and the same rule applied to the under-tenant of the life tenant.

Estates for life may be expressly granted, as those already discussed, or they may be such as are created by the construction and operation of law, as the rights possessed by husbands and wives in each other's land, to be hereafter considered.

CHAPTER III.

OF AN ESTATE TAIL.

Sec. 1440. MEANING OF AN ESTATE TAIL.

—An estate tail arose when land was granted to a man *and the heirs of his body*. It is such an estate as will descend, on the decease of the first owner, to all of his lawful issue, children, grandchildren, and more remote descendants, so long as his posterity endures,—in a regular order and course of descent from one to another; and, on the other hand, if the first owner should die without issue, his estate, if left alone, will then determine.* Estates tail were never common in the United States, as being foreign to our institutions, and where existing have been commonly abolished by statute. As a result of state statutes, words which would under the English law create an estate tail, or fee tail, now create a fee simple in the donee, or a life estate in

*Williams, Real Prop. 35. Blackstone observes, "As the word *heirs* is necessary to create a fee, so in farther limitation of the strictness of the feudal donation, the word *body*, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance, or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate tail. As, if a grant be to a man and his *issue of his body*, to a man and his *seed*, to a man and his *children*, or *offspring*; all these are only estates for life, there wanting the words of inheritance, his heirs." 2 Com. 114.

the donee, with remainder in fee simple to the issue as tenants in common.*

"An estate tail may be either *general*, that is, to the heirs of his body generally and without restriction, in which case the estate will be descendible to every one of his lawful posterity in due course; or *special*, when it is restrained to certain heirs of his body, and does not go to all of them in general; thus, if an estate be given to a man and the heirs of his body by a particular wife; here none can inherit but such as are his issue by the wife specified. Estates tail may be also in *tail male*, or in *tail female*: an estate in *tail male* cannot descend to any but males, and male descendants of males; so an estate in *tail female* can only descend to females, and female descendants of females.** The possessor of an estate tail is called a *donee* in tail, the word *donee*, like *grantee*, and *lessee*, being the correlative of *donor*, *grantor* and *lessor*, are used to distinguish the person for whom an act is done, from him who is to perform it. The donee in tail is also called a *tenant in tail*, since his possession is but a holding; his estate is also a freehold, being greater than estate for life.

Sec. 1441. EARLY HISTORY AND CONSTRUCTION OF AN ESTATE TAIL.—The life estates first granted by feudal lords soon came to be en-

*Perry v. Kline, 12 Cush. 118; Pollock v. Speidel, 17 O. S. 439; 4 Kent, Com. 15 n.

**2 Bl. Com. 113, 114; Litt. ss. 13-21.

larged into estates that were hereditary. To make such a grant we have seen that the word *heirs* had to be used. This term was at first limited to include only the direct issue of the tenant, but later the word heirs came to include collateral relations, such as brothers and cousins of the tenant, so that if it was desired to limit the estate to the offspring of the donee, it was done by making a grant to *A and the heirs of his body*, making what was then considered a *conditional gift*, the condition being that if the donee died without such mentioned heirs, or upon the failure of such heir at any future time, the land should revert to the donor.

In the earliest feudal times the ancestor had not the right to alienate his land so as to defeat the expectation of his heir, and the development of the right to alienate land was slow and extended over a long period of time. Part of the ancestor's land might be given as a marriage portion to his daughter, and to religious purposes, and lands so given became free from all manner of feudal service to the donor except the oath of fealty. At first lands were largely granted in consideration of services to be rendered, or a species of rent, there being no sales of land for cash, as is now customary. Gradually it came about that when a grant was made to *A and his heirs*, or the *heirs of his body*, that A had the unquestioned right to dispose of such lands, so far as it was possible under the feudal system to dispose of them, and thereby cut off the expectancy of the heirs. That is, by the reign of Henry III, it was established that though lands were granted to A and

the heirs of his body, or to A and his heirs generally, A could by alienation cut off the expectancy of his heirs at once if the estate was granted to him and his heirs generally, and if to him and the heirs of his body, he could do so the moment he had issue born satisfying the *condition* of the gift, and the alienee or purchaser took the estate not only during the existence of the issue but also after their failure.*

Sec. 1442. SAME SUBJECT—OF THE STATUTE *de donis conditionalibus*.—The right of the tenant in tail to alienate his holdings the moment he had issue born that satisfied the conditions of the grant, was distasteful to the barons of the reign of Edw. I, since it put an end to the reversions which they had intended should come about through the failure of issue. To remedy the evil to them, and restore the crumbling feudal system, they passed the famous statute *De Donis Conditionalibus* (13 Edw. I), also known as the statute of Westminster the Second, or simply the statute *De Donis*, by which it was enacted that from thenceforth the grant should be construed according to the conditions of the gift, that the will of the donor as expressed therein might be observed. This

*Co. Litt. 43 a; Williams, *Real Property*, 41. The tenant in tail might also have aliened the lands *before* issue born, but the effect of such alienation would only have been to exclude the lord during the life of the tenant, and during that of the issue, if such issue were subsequently born, while if the alienation were *after* the birth of issue, its effect was complete. Plowden, 241; Nevil's Case, 7 Coke, 34 b.

statute was intended to put an end to the right of a tenant in tail to dispose of holdings, and cause the property to remain intact to his issue, or on failure thereof to revert to the original donor.* The effect of the statute of De Donis, while satisfactory to the barons or greater lords, was distasteful to the crown, as putting them beyond the penalties of forfeiture, since their estates were limited to their issue, and became galling to the trading and industrious classes. "Children, it is said, grew disobedient when they knew they could not be set aside; farmers were deprived of their leases; creditors were defrauded of their debts; and innumerable latent entails were produced to deprive purchasers of the land they had fairly bought; treasons also were encouraged, as estates tail were not liable to forfeiture longer than for the tenants' life."** The nobility, notwithstanding these evils, would not consent to repeal the statute, and entails existed in all their severity for a period of two hundred years, when alienation of such estates was again introduced by a scheme

*"Since the passing of this statute, an estate given to a man and the heirs of his body has been always called an estate tail, or, more properly, an estate in *fee tail* (*feudum talliatum*). The word *fee* (*feudum*) anciently meant any estate feudally held by another person; but its meaning is now confined to estates of inheritance—that is, to estates which may descend to heirs; so that a *fee* may now be said to mean an inheritance." Williams, Real Prop. 43; Wright's Tenures, 5, 149.

**Williams, Real Prop. 44.

well worthy of the astuteness of the common law judges and lawyers.*

Sec. 1443. SAME SUBJECT—OF COMMON RECOVERIES.—The right of the tenant in tail to alienate his land being denied by the statute De Donis, and a repeal of the statute being impossible, the only way was to devise some new plan by which the holding of the donee in tail could be transferred to another, and the entail destroyed. This was accomplished by an unheralded decision of the common law judges in the 12th year of the reign of Edw. IV, which is thus explained by Williams:

“In this case, called Taltarum’s Case, the destruction of an entail was accomplished by judicial proceedings collusively taken against a tenant in tail for the recovery of the lands entailed. Such proceedings were not at that period quite unknown to the English law, for the monks had previously hit upon a similar device for the purpose of evading the statutes of Mortmain, by which open conveyances of lands to their religious houses had been prohibited; and this device they had practiced with considerable success till restrained by act of parliament. In the case of which we are now speaking, the law would not allow the entail to be destroyed simply by the recovery of the lands entailed, by a friendly plaintiff on a fictitious title; this would have been too barefaced; and in such a case the issue of the tenant, claiming under the gift to him in tail, might have recovered the lands by means of a writ of *formedon*, so called, because they claimed *per formam doni*, according to the form of the gift, which the statute had

*2 Bl. Com. 116; 358.

declared should be observed. The alienation of the lands entailed was effected in a more circuitous mode, by judicial sanction being given to the following proceedings, which afterwards came in to frequent and open use, and had some little show of justice to the issue, though without any of its reality. The tenant in tail, on the collusive action being brought, was allowed to bring into court some third person, presumed to have been the original grantor of the estate tail. The tenant then alleged that this third person had *warranted* the title; and accordingly begged that he might defend the title which he had so warranted. This third person was accordingly called on; who, in fact, had had nothing to do with the matter; but, being a party in the scheme, he admitted the alleged warranty, and then allowed judgment to go against himself by default. Whereupon judgment was given for the demandant or plaintiff, to recover the lands from the tenant in tail; and the tenant in tail had judgment empowering him to recover a recompense in lands of *equal* value from the defaulter, who had thus cruelly failed in defending his title. If any such lands *had* been recovered under the judgment, they would have been held by the tenant for an estate tail, and would have descended to the issue, in lieu of those which were lost by the warrantor's default. But the defaulter, on whom the burden was thus cast, was a man who had no lands to give, some man of straw, who could easily be prevailed on to undertake the responsibility; and, in later times, the crier of the court was usually employed. So that, whilst the issue had still the judgment of the Court in their favor, unfortunately for them it was against the wrong person; and virtually their right was defeated, and the estate tail was said to be *barred*. Not only were the issue barred of their right, but the donor, who had made the grant, and to

whom the lands were to revert on failure of issue, had his reversion barred at the same time. So also all estates which the donor might have given to other persons, expectant on the decease of the tenant in tail without issue (and which estates are called *remainders* expectant on the estate tail), were equally barred. The demandant, in whose favor judgment was given, became possessed of an estate in fee simple in the lands; an estate the largest allowed by law, and bringing with it the fullest powers of alienation, as will be hereafter explained: and the demandant, being a friend of the tenant in tail, of course, disposed of the estate in fee simple according to his wishes.”*

This system of barring an estate tail, known as suffering common recoveries, held its ground because of the substantial benefits to the general mass of people, and was perfected into a regular procedure, a privilege inseparably incident to an estate tail, which could not be restrained by custom, statute or covenant.** Entails were also allowed to be barred by a system of fines, or fictitious suits, commenced and then compromised by leave of court.*** Both of these systems were later supplanted by an act of parliament, which permitted a tenant in tail in possession by a simple deed enrolled in the Court of Chancery to dispose of the lands entailed for an estate in fee simple.**** In Canada and such of the United States as have not abol-

*Real Prop. 44, 45. See, also, 2 Bl. Com. 360.

**Taylor v. Horde, 1 Burrow, 84; Dewitt v. Eldred, 4 W. & S. 421.

***2 Bl. Com. 348.

****Williams, Real Prop. 48; 3 and 4 Will. IV., c. 74.

ished entails by statute, the tenant in tail may bar the entail by a simple deed acknowledged in open court for that purpose.*

Sec. 1444. SAME SUBJECT—EXCEPTIONS TO THE RIGHT OF TENANT IN TAIL TO BAR THE ENTAIL.—There were several cases in which the tenant in tail was not permitted to bar the entail as shown in the last section. Estates tail granted by the crown as a reward for public services could not be barred so long as the reversion remained in the crown. So it was held that an estate tail could not be barred by any person who is *tenant in tail after possibility of issue extinct*, as where an estate has been given to A and the heirs of his body by his present wife, and the wife dies without issue, A is then a tenant in tail after possibility of issue extinct, and could not suffer a common recovery so as to bar the reversion.**

Sec. 1445. SAME SUBJECT—RIGHTS OF A TENANT IN TAIL.—The tenant in tail could cut down timber and commit waste, without first barring the entail. He was also allowed by statute to make leases of the land, not to exceed twenty-one years, or three lives, from the day of making thereof, and the accustomed yearly rent had to be reserved. By statute, and otherwise, in England, estates tail are chargeable with the judgments for debts owing by the tenant in

*Rev. Stat. Can. 100; Purdon's Dig. 721.

**2 Bl. Com. 124, 125.

tail, and may also be disposed of in bankruptcy proceedings against the tenant in tail.*

As estate tail will descend if not barred to the issue of the donee, in due course of law, and in general the same as an estate in fee simple descends, as will hereafter be explained. Such estates are subject to the reciprocal claims of husband and wife in each other's property, as will also be hereafter explained.

*Williams, Real Prop. 56, 57.

CHAPTER IV.

OF A FEE SIMPLE ESTATE, AND THE RULE IN SHELLEY'S CASE.

Sec. 1446. MEANING OF AN ESTATE IN FEE SIMPLE.—“An estate in fee simple (*feudum simplex*) is the greatest estate or interest which the law of England allows any person to possess in landed property. A tenant in fee simple is he that holds lands or tenements to him *and his heirs*; so that the estate is descendible, not merely to the heirs of *his body*, but to *collateral* relations, according to the rules and canons of descent. An estate in fee simple is of course an estate of *freehold*, being a larger estate than one for life or in tail.”*

The chief importance and characteristic of this estate is the unfettered right of alienation on the part of the tenant holding in fee simple. This right was not acknowledged at first, but was of gradual growth, being assisted by the statute of *Quia Emptores* (18 Edw. I, c. 1), which permitted the selling of land, or a part thereof, provided the feoffee, or purchaser, should hold the lands by the same services and customs as his predecessor had held them. The object of the statute being to protect the claims upon the land owing to the chief lord.* Another feature of fee sim-

*Williams, Real Prop. 60; 3 Bl. Com. 224.

ple estates, is that they are subject, though in the hands of the heir or devisee, to debts of all kinds contracted by the deceased tenant. This liability for debts of the tenant on such an estate, while general and undoubted now, was also of slow growth. It is said, that in the early periods of English history, the heir of a deceased person was bound, to the extent of the inheritance which descended to him, to pay such of the debts of his ancestor as the goods and chattels of the ancestor were not sufficient to satisfy, which rule was possibly borrowed from the Roman or Civil law. But the feudal system, seeking to keep the land free from personal obligations, infringed on this ancient rule, and in the reign of Edw. I, it was laid down by Britton that no one should be held to pay the debt of his ancestor, whose heir he was, to any other person than the king, unless he were by the deed of his ancestor especially bound to do so. This continued to be the law of England for a long period, and unless the ancestor had, by a deed in writing, under seal, called a *specialty*, charged himself as well as his heirs with the payment of a debt or contract, it was not allowed to become a claim against his estate. In 1807, by statute, the fee simple estates of deceased *traders* were rendered liable to the payment not only of debts in which their heirs were bound, but also of their simple contract debts; and in 1833 this provision was made to apply to all owners of fee simple estates.*

*Williams, Real Prop. 79, 80

In America, the feudal doctrine, as regards the heir of an estate taking it free from the debts of the ancestor never prevailed, and it is said that from the earliest settlement of the colonies, real estate has been liable to the debts and charges of the ancestor, in the hands of his devisees, his heirs, and *bona fide* purchasers from them. And this common law principle has been ratified by statute in many of the states, in some cases dating back to colonial times. So that, as a general rule, in the United States, lands are liable for the debts of a decedent, whether due by matter or record, specialty, or simple contract. In the two latter cases, the existence of the debt creates no lien during the debtor's life. By his death, however, its quality is changed, and it becomes a lien upon his real estate, which descends to the heir or passes to the devisee, subject to the payment of all the debts of the ancestor, according to the laws of the state in which the lands are situated, and the right of the creditor can, in most of the states, be enforced against the lands in the hands of a *bona fide* purchaser, within certain statutory limitations as to time.

The right of alienation of an estate, except an estate tail, is now recognized as inherent, and it is impossible for any owner, by any means to divest himself of the right. Neither is it possible for the owner of an estate to prevent the involuntary alienation of it for the payment of his debts. And any condition in

general restraint of its alienation is void.* Partial restraint on alienation, if reasonable, will be allowed.** And land may be so granted, in trust, that in case the one to be benefited by the trust becomes bankrupt, or attempts to dispose of them, they shall revert to the donor, and the interest of the bankrupt in such property thereby ceases.***

Sec. 1447. THE RULE IN SHELLEY'S CASE, ITS ORIGIN AND EFFECT.—The rule in Shelley's Case, is a legal construction placed upon the words, "the heirs", "heirs of his body", and the like when used in a conveyance giving the grantor a freehold estate. The rule is stated thus: "When the ancestor, by any gift or conveyance (assurance), takes an estate of freehold, and in the same gift or conveyance, an estate is limited, either mediately or immediately, to his heirs in fee or in tail, in such case the expression *the heirs* are words of limitation of the estate, and not words of purchase."**** This rule takes its name from a celebrated case in Lord Coke's time, in which the rule was

*Schermerhorn v. Meyers, 1 Denio, 448; Walker v. Vincent, 7 Harris, 369; Gleason v. Fayerweather, 4 Gray, 348.

**Langdon v. Ingram, 28 Ind. 360; McWilliams v. Nisly, 2 Ser. & R. 507; Oxley v. Lane, 35 N. Y. 347; Hill v. Hill, 4 Barb. 419.

***Williams, Real Prop. 94; Lockyer v. Savage, 2 Str. 947; Brandon v. Robinson, 18 Ves. 429.

****Williams, Real Prop. 254 n.

plainly formulated and laid down, but was in fact of much earlier origin.*

The rule as enunciated needs some explanation on account of the wrong meaning that might be given to the word "limitation." The explanation given by Williams, in his treatise, may be used for this purpose:

"We have already seen that, in ancient times, the feudal holding of an estate granted to a vassal continued only for his life. And from the earliest times to the present day a grant or conveyance of lands, made by any instrument (a will only excepted), to A. B. simply, without further words, will give him an estate for his life, and no longer. If the grant was anciently made to him and his heirs, his heir, on his death, became entitled; and it was not in the power of the ancestor to prevent the descent of his estate accordingly. He could not sell it without the consent of his lord; much less could he then devise it by his will. The ownership of an estate in fee simple was then but little more advantageous than the possession of a life interest at the present day. The powers of alienation belonging to such ownership, together with the liabilities to which it is subject, have almost all been of slow and gradual growth, as has already been pointed out. A tenant in fee simple was, accordingly, a person who held to him and his heirs; that is, the land was given to him to hold for his life, and to his heirs to hold after his decease. It cannot, therefore, be wondered at that a gift expressly in these terms, 'To A. for his life, and after his decease to his heirs,' should have been anciently regarded as identical with a gift to A. and his heirs, that is, a gift in fee simple. Nor, if such was the law formerly, can it be matter of surprise that the

*Shelley's Case, 1 Rep. 94, 104.

same rule should have continued to prevail up to the present time. Such indeed has been the case. Notwithstanding the vast power of alienation now possessed by a tenant in fee simple, and the great liability of such an estate to involuntary alienation for the purpose of satisfying the debts of the present tenant, the same rule still holds; and a grant to A. for his life, and after his decease to his heirs, will now convey to him an estate in fee simple, with all its incidents; and in the same manner, a grant to A. for his life, and after his decease to the heirs of his body, will now convey to him an estate tail as effectually as a grant to him and the heirs of his body. In these cases, therefore, as well as in ordinary limitations to A. and his heirs, or to A. and the heirs of his body, the words *heirs* and *heirs of his body* are said to be *words of limitation*; that is, words which limit or mark out the estate to be taken by the grantee. At the present time, when the heir is perhaps the last person likely to get the estate, these words of limitation are regarded simply as formal means of conferring powers and privileges on the grantee—as mere technicalities, and nothing more. But, in ancient times, these same words of limitation really meant what they said, and gave the estate to the heirs or the heirs of the body of the grantee, after his decease, according to the letter of the gift.”*

In effect, the rule in Shelley’s Case determines when a tenant having a freehold grant shall be free to alienate it or bar the issue in tail, though the word heir is mentioned in the grant. It being held that in such cases the words *heirs* or *heirs of his body*, are not

*Real Property, 254, 255.

words of purchase, designating the person who take under the deed, which would give the heir a present interest which could not be cut off by the grantee, but are simply to describe or limit—in the sense of bounding—the estate conveyed. That is, if lands are given or granted to A, and after his death to his heirs; or to A for life, then to B for life, remainder to the heirs of A, this immediate or mediate limitation to the heirs of A, under the rule in Shelley's Case, does not make such heirs purchasers, or confer upon them any interest in the grant which A cannot cut off by alienation; the words being descriptive of the estate given A, showing that it is larger than a life estate, and not descriptive of the persons who take the fee. So that the result of the rule is that A takes such an estate free from any obligations to the heirs, except such as were incident to an estate tail, and already discussed, to bar which, in early times, he would have to suffer a common recovery.

The rule in Shelley's Case is, therefore, a rule of law, since it is a rule of construction which determines the force, meaning and legal effect of the words, *his heirs*, when used in connection with other words and phrases.*

*Tiedeman, Leading Cases, 355; 131 Pa. St. 56. In the Pennsylvania case, a grant was made to a woman and her heirs, in trust, and the trust was to be for the life of the woman, remainder to her heirs. The woman deeded the property and at her death her children brought a suit in ejectment to recover the land. The question being the con-

The object of the establishment of a definite rule for the interpretation of words of inheritance is presumed to have been intended to prevent the inheritance or fee remaining in abeyance, and perhaps, also, to facilitate the alienation of land.* The rule resulted in a fixed and definite legal construction on the words "his heirs."

This meaning, it is to be understood, was the legal and technical meaning, but as regards devises, while the testator is presumed to have this technical meaning in view, yet this presumption may be overcome by showing that such an intent is inconsistent with the express meaning of the grant taken as a whole.**

struction of the words "her heirs." The court held that the rule in Shelley's Case prevailed in Pennsylvania, and the words simply described or bounded the estate of the mother, and that the heirs did not become purchasers thereunder, the mother taking an absolute fee with the right to dispose of it in her lifetime. And this rule has been extended to cover cases where the word heirs is so used, though the grantor did not intend it so, on the theory that a grantor is presumed to know the legal meaning of the words he uses.

*Perrin v. Blake, 4 Burr. 2579.

**10 Eng. Rul. Cases, 689; 4 Burr. 2579; 1 Wm. Bl. 672; 62 Ill. 86. "The origin of the rule, however plausible may be the suggestions of learned men upon the subject, is lost in obscurity; but whatever that may be, or whether its continuance can be justified upon any rational grounds, it still remains as firmly rooted in English jurisprudence as any other rule whose origin is clear, and whose utility is manifest."—Tudor's Leading Cases on Real Property, 482.

Sec. 1448. CASES WHERE THE RULE IN SHELLEY'S CASE DOES NOT APPLY.—There are several cases where the rule in Shelley's Case does not apply, or which may be denominated as exceptions to the rule; these are:—

1. Cases where the ancestor is not granted an estate of freehold, that is, his estate is less than a life interest.

2. Cases where no estate of inheritance is given to the heirs.

3. When other explanatory words are subjoined to the word *heirs* showing an intent to have them take as purchasers.

4. Cases where the new estate of inheritance is grafted upon the heirs of his body, and the heirs are thereby made the stock of descent, rather than the ancestor.

These cases or exceptions we will now consider briefly.

Sec. 1449. CASES WHERE NO FREEHOLD IS GIVEN THE ANCESTOR OR ESTATE OF INHERITANCE TO THE HEIRS.—The first two exceptions to the rule may be considered in connection, as the reasoning is the same. If the estate given to the ancestor is less than a freehold, it is a mere chattel. There is no seizin of the fee in him, and this being in another, the words "his heirs" become words of purchase, indicating the person who are to be seized of the freehold, and the first tenant takes but a chattel

real, or possession for a term of years. If the life estate is given to the heirs, and the freehold to the ancestor, as where an estate of freehold is granted to A, remainder at his death to his heirs, or to the heirs of his body in fee, he would take an estate of freehold of fee simple, or fee tail, as the case might be. Whereas, if A grants an estate to B for five hundred years, remainder to his heirs, B takes an estate for five hundred years, and the heirs take the remainder in fee. When the first estate is less than a freehold, as for a term of years, the ancestor does not take the fee simple or fee tail. While if an estate is given to A for life, remainder to his heirs for life, then there are two life estates, and the whole fee has not been granted to either the ancestor or the heirs, but is still in remainder, in such a case the word *heirs* becomes a word of purchase, and is not descriptive of the estate granted to the ancestor. The ancestor takes but a life estate, and the word *heirs* is not necessary to create such an estate.

Sec. 1450. WHEN THE EFFECT OF THE WORD "HEIRS" IS CHANGED BY EXPLANATORY WORDS.—It is a primary rule in the construction of wills, and devises therein made, as well as in the construction of a deed, to ascertain the intent with which it was executed, and to give effect to every phrase and clause if possible. So that where there is provision in the will or deed wholly inconsistent with a fee simple or fee tail vesting in the ancestor, then the *heirs* mentioned in such grant must be construed

to take as purchasers, and the word "heirs" is not construed under the rule in *Shelley's Case* as describing the estate of the ancestor.*

Sec. 1451. WHERE THE NEW ESTATE OF INHERITANCE IS GRAFTED ON THE HEIRS, THE RULE DOES NOT APPLY.—When the freehold estate for life is given to the ancestor, with the remainder to the heir in fee tail, that is, the heir is made the stock of descent instead of the ancestor, the ancestor does not take an estate in fee or in fee tail, but simply a life estate, and the second taker secures the estate tail. In such cases, the grantor has in mind that the first tenant should have a life estate, and the remainder should go to his oldest son, and to the oldest son of the oldest son. The courts hold the words in such a grant are not descriptive of the estate given to the first taker, because the ancestor has taken the precaution to point out that the estate shall go to the son after the death of the first taker, and to the heirs of that son, and, therefore, the son is made the stock of descent and not the ancestor.**

Sec. 1452. OTHER EXAMPLES WHERE THE RULE DOES NOT APPLY.—The rule in *Shelley's Case* requires that the freehold shall be granted to the ancestor, and in the same instrument the fee simple or fee tail shall be limited to his heirs. Consequently

**Perrin v. Blake*, 4 Burr. 2579; 1 Wm. Bl. 672; 1 Dougl. 343; *Hargrave's Law Tracts*, 489.

**1 Coke Rep. 66; 2 P. Wms. 176; 17 B. Monr. 282; 13 R. Isl. 71.

if a freehold is given to A, and remainder to the heirs of B, in fee or fee tail, the heirs of B will take as purchasers.*

Again, in order that the rule in Shelley's Case may apply, the estate granted to the ancestor and the heir must in each case be both legal or both equitable estates. Thus, suppose an estate for life is given to A, and remainder to his heirs in trust. In this case the word "heirs" cannot be used as descriptive of the estate given to A, because the estate given to him is a legal estate, and the remainder goes to his heirs in trust—an equitable estate. Hence it follows, that the word *heirs* cannot be descriptive of the estate given to the ancestor if the estate given the ancestor is different from the estate given to the heirs.**

Sec. 1453. THE RULE IN SHELLEY'S CASE IS ABROGATED BY STATUTE IN MANY OF THE AMERICAN STATES.—The rule in Shelley's Case, by reason of working out different from the intention of the grantor in many cases, has been abolished by statute in Maine, Massachusetts, California, Kansas, West Virginia, Connecticut, New York, Illinois, Missouri, Alabama, Kentucky, Minnesota, Tennessee, Virginia, Wisconsin and Michigan. In New Hampshire and New Jersey as to devises; in Ohio and Oregon as

*Coke, Litt. 378 a; 2 Coke, 51; 10 Coke, 50; 3 Coke, 20; 7 Cranch, 456.

**2 Term, Rep. 444; 62 Ill. 86; 133 Pa. St. 342; 45 Ia. 437; Tallman v. Wood, 26 Wend. 9; Curtis v. Rice, 12 Ves. 89.

to wills, and in Rhode Island as to devises to one for life, remainder to his children or issue generally.*

*"When lands, tenements, or hereditaments are given by will, to any person for his life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall be construed to vest an estate for life only in such first taker, and a remainder in fee simple in his heirs."—Rev. Stat. Ohio, Sec. 5968. See, also, *Bowers v. Porter*, 4 Pick. 205; *Richardson v. Wheatland*, 7 Metc. 172; 2 Washb. Real Prop. 607n.

CHAPTER V.

OF REVERSIONS AND REMAINDERS.

Sec. 1454. MEANING OF A REVERSION.—A reversion is that estate which the grantor has after the particular estate which has been granted to another terminates. In other words, a reversion is that portion of the fee simple which remains in the grantor after the termination of a particular estate which has been carved out of it. If, for instance, the person having the fee creates a life estate, the life tenant is *vested* (clothed with) the estate, and under the feudal system he was given the actual possession, and was regarded as seized of the freehold during his life. The grantor was vested of the reversion; that is, he had a fee simple estate after the termination of the life estate. The whole estate had not been granted, and that which remained in the grantor to be re-enjoyed after the termination of the estate granted was called a reversion. The legal right of the grantor in the estate is as large before the intermediate estate terminates as after, but the *reversion* applies to the use of the land, of which he is deprived until the life estate terminates.* The life estate is called the *particular estate*.

*Co. Litt. 22b, 142b; Plowd. 151, 195. "If a tenant in fee simple should grant to another person a lease for a term of years, or for life, or even if he should grant an estate tail,

Sec. 1455. MEANING OF A REMAINDER.—
“If at the same time with the grant of the particular estate he (the grantor) should also dispose of his remaining interest or *reversion*, or any part thereof, to some other person, it then changes its name, and is called, not a *reversion*, but a *remainder*. Thus, if a grant be made by A, a tenant in fee simple, to B for life, and after his decease to C and his heirs, the whole fee simple of A will be disposed of, and C’s interest will be termed a *remainder*, expectant on the decease of B. A remainder, therefore, always has its origin in express grant; a reversion merely arises incidentally, in consequence of the grant of the particular estate.

it is evident that he will not thereby dispose of all his interest; for in each case, his grantee has a less estate than himself. Accordingly, on the expiration of the term of years, or on the decease of the tenant for life, or on the decease of the donee in tail without having barred his estate tail and without issue, the remaining interest of the tenant in fee will *revert* to himself or his heirs, and he or his heir will again become tenant in fee simple in possession. The smaller estate which he has so granted is called, during its continuance, the *particular* estate, being only a part or *particula*, of the estate in fee. And during the continuance of such particular estate, the interest of the tenant in fee simple, which still remains undisposed of—that is, his present estate, in virtue of which he is to have again the possession at some future time—is called his *reversion*.”—Williams, Real Prop. 241. The statute De Donis, referred to in Chapter 3, secured to the grantor of an estate tail a reversion upon the death of the tenant in tail without heirs, until common recoveries came into vogue. Co. Litt. 22a.

It is created simply by the law, whilst a remainder springs from the act of the parties.”*

Sec. 1456. HOW A REVERSION OR REMAINDER MIGHT BE CONVEYED AT COMMON LAW.—If a tenant in fee simple made a lease of his land for a term of years, his reversion, in law, is but a continuance of his former estate, the tenant by lease being regarded as a mere bailiff for the owner, and the grantor and his heirs have the right to dispose of their interest the same as before leasing. But if the owner in fee grants a life estate, or freehold estate, by the rules of the common law the life tenant takes the seizin, or is invested with the property, and is presumed as invested with the estate in fee simple during his life, that is, his life estate carries with it the freehold or feudal seizin, so that, the owner in fee simple could not make a feoffment (conveyance by livery or seizin) since his reversion is strictly incorporeal during the life of the tenant for life, the owner having no seizin, could give none, and to convey this incorporeal reversion the grantor, or owner of the fee simple, had to make a deed of grant.**

At the common law a feoffment or conveyance of real property in freehold was affected by livery of seizin. And that seizin meant the putting the tenant in actual possession of the land, and announcing in the presence of witnesses, what estate he took, and for

*Williams, Real Prop. 242; 2 Bl. Com. 163.

**Co. Litt. 153a; Id. 366b; Shep. Touch, 230; Williams, Real Prop. 242, 243.

whom he held in reversion or remainder. Under the old feudal system, when the lord granted an estate to A for life, and put him in possession by livery of seizin, all other tenants were put out of possession, and it was then announced to all of the witnesses present, that A was given possession for himself for life, of the life estate, and possession for B in remainder, if such was the case, or possession for the lord as reversioner, if there was no remainder granted to any one.*

Sec. 1457. WHEN THE SEIZIN OF ANY SUBSEQUENT ESTATE MUST TAKE EFFECT.—The seizin of any subsequent estate must take effect immediately upon the termination of the precedent estate. Under the old feudal system there must be some one who had the immediate right to the seizin. The seizin could not be in abeyance. The exigencies of the feudal system required that the immediate seizin of the freehold should never be in abeyance, since upon the seizin of the land by tenants who held by reason of military service or rent, and allegiance to the lord paramount, depended the whole fabric of the feudal government. If the estate was in abeyance, and no one in possession, there would be no one to support the king. The right of a person to an estate depended upon his right to take immediate possession of it upon the termination of the preceding estate.**

*Co. Litt. 48, 49, 50.

**Co. Litt. 342b, Butler's note.

As a result of the principle just stated, future estates could not be granted in fee, as the tenant by the future fee could not be put in possession of the title to the land without livery of seizin, and this was in another. Title never passed until possession was given; the title and possession being regarded as inseparable. Hence, a grant to A for life, remainder to B in fee, is good; but a grant to A for life, remainder after one year to B in fee, is void at the common law. The reason being, that the moment the life estate is ended there must be some one in being, with the right to take the immediate seizin, and if the person to whom you give the fee is not able to take possession of the fee the moment the life estate drops out, the grant is void as incompatible with the rule of the common law.* So that, it follows from this principle, that a grant of a freehold to take effect in the future can never be made.**

Sec. 1458. EVERY REMAINDER OF AN ESTATE OF FREEHOLD MUST HAVE A PARTICULAR ESTATE OF FREEHOLD TO SUPPORT IT.—The legal conception of a fee simple estate in lands is that it may be cut into ever so many parts, or estates, if each of such estates is supported by, or rests upon its predecessor and ready to come into being the moment the other is determined. Thus it is permissible to grant a life estate to A, remainder to B for life, remainder to C for life, remainder to D

*Plowden, 29.

**Co. Litt. 217a; 5 Coke, 94b.

in fee, since each estate is supported by the preceding estate, and taking them altogether you have an entire fee simple.*

During the continuance of the particular estate of freehold, the freehold in remainder might be in abeyance, however, because the seizin of the particular estate was sufficient to satisfy the requirements of the feudal tenure. Consequently the remainder could be limited to take effect upon condition, or to vest in some person to be ascertained thereafter, and the uncertainty as to the happening of the event, or the ascertainment of the person, could continue so long as the particular estate continued; but the remainder must have become certain before or at the termination of the particular estate, or else it would lapse. Therefore, if an estate is given to A, remainder to the heirs of B, and B is alive, this a good conveyance, so long as the

*"So long as a regular order is thus laid down, in which the possession of the lands may devolve, it matters not how many kinds of estates are granted, or on how many persons the same estate is bestowed. Thus a grant may be made at once to fifty different people separately for their lives. In such a case the grantee for life who is first to have the possession is the particular tenant to whom, on a feoffment, seizin would be delivered, and all the rest are remaindermen; whilst the reversion in fee simple, expectant on the decease of them all, remains with the grantor. The second grantee for life has a remainder expectant on the decease of the first, and will be entitled to possession on the determination of the estate of the first, either by his decease or forfeiture, or otherwise. The third grantee must wait until the estate of both the first and second shall have determined; and so of the rest."—Williams, Real Prop. 251. See, also, 2 Bl. Com. 167, 171.

particular estate continues. And if B should die before the tenant for life, thereby giving to his heirs the right to take (as he has no heirs while living) his heirs will take the estate on the death of A; but if B outlives A, then the remainder over is void, because the seizin would be in abeyance, there being no heir to take.*

Sec. 1459. OF VESTED AND CONTINGENT REMAINDERS.—When a remainder is granted to an ascertained and definite person it is called a *vested* remainder; thus, if an estate is granted to A for life, remainder to B in fee, B is given a vested remainder. While if the remainder is limited to take effect upon the happening of an uncertain event, or is granted to a person whose identity is uncertain, it is called, so long as this uncertainty exists, a *contingent* remainder. As soon as the uncertain event happens, or the identity of the person becomes certain, the contingent remainder becomes a vested remainder. A contingent remainder, because of the fact that it might never vest, was long regarded as illegal by the early common law. But about the time of the reign of Henry VI, it was adjudged that such a remainder was valid so long as the particular estate supporting it existed.**

*Co. Litt. 342, 378, According to the common law, a person has no heirs while living, the maxim being, *nemo est haeres viventis*, hence in the example given, if B dies before A, the heirs mentioned are determined and vested with the remainder in fee, but if A dies first there are no heirs of B, under the maxim, and the estate lapses.—Williams, Real Prop. 264.

**Year Book, 9 Henry VI, 24a; Williams, Real Prop. 264.

A remainder is said to be vested in a person when he and his heirs have a right to the immediate possession of the estate upon the termination of the particular estate. And a remainder is nevertheless a vested one, though it may never be enjoyed by reason of the fact that the particular estate may outlast the remainder, as where the remainder is a life estate supported by another life estate. It is the uncertainty as to the estate vesting *in interest*, that characterizes a contingent remainder, and not the vesting of the possession.

If an estate is given to A for life, remainder to the heirs of B, and B is dead, the remainder is vested. But if an estate is given to A for life, remainder to the heirs of B, and B is alive, the remainder is not vested, although B may have several children, they are only heirs expectant.*

Sec. 1460. HOW A GRANT IS CONSTRUED AS REGARDS CREATING A VESTED OR CONTINGENT REMAINDER.—Whether a remainder is vested or contingent depends upon the language creating the remainder. If in the creation of the remainder the conditional element is incorporated and made a part of the description of the remainder, it is contingent. If, however, after words giving a vested remainder, a clause is added divesting it upon certain conditions, it is still a vested remainder, though liable

*Co. Litt. 342, 378; Williams, Real Prop. 265, 266.

to be divested. Thus, for example, a devise to A for life, remainder to his children, but if any child dies in the life time of A, his share to go to the surviving brothers and sisters; this is a vested remainder, though the vested remainder of each child is liable to be defeated by his death. But if the devise is to A, remainder to the children who survive him, this remainder is not to a single one of the children now in existence, but to the children *who survive*, and it is uncertain who will survive, so that the remainder is contingent and does not vest until the death of A.*

When there is a gift over in a will to the right heirs, it is sometimes difficult to determine whether the *right heirs* designated are those persons who were his heirs at the time of his death, when the will took effect, or his heirs when the remainder over is ready for distribution, at the death of the first taker. The general rule is, that where a remainder is given over to the heirs of the testator, the testator means the heirs of himself in existence at the time of his death, unless there is something in the will which indicates beyond a question, that he means the heirs that are in existence at the time the life estate terminates.**

In such devises the rule as regards the exclusion of the first taker from sharing in the remainder is, that if it appears from the will that the estate given the first taker was all the estate that the testator intended he

*13 R. I. 71; 83 Pa. St. 462; 71 Mo. 371.

**139 Ill. 433; Tiedeman's Cases, 301.

should have, then the estate goes to those persons who are the right heirs of the testator at the time of his death, and the first taker, although he may be a right heir at that time, is excluded.*

*61 Pa. St. 111; 9 Beav. 376; 2 M. & K. 80; 3 Sim. 627; 8 Ves. 38; 3 M. & K. 235.

CHAPTER VI.

OF ESTATES UPON CONDITION.

Sec. 1461. WHAT IS MEANT BY AN ESTATE UPON CONDITION.—An estate upon condition is such that it will be created, enlarged or defeated, upon the happening of some uncertain event.

In regard to all estates upon condition, it may be said as to the condition upon which the estate is limited, that it must be a good or valid condition. What is meant by a good or valid condition is that it must be one not repugnant to the grant which has been made. Thus, if a man is granted a certain estate, and there are certain rights, powers and privileges, passing as incident to that estate, a condition that he could not exercise those rights or powers, would not be good or valid, since it would be repugnant to the grant.

Likewise, a condition to be good must not be contrary to, or in violation of good morals or public policy.

And a condition which in its very nature is impossible of performance is void, as the courts will never require or expect a man to perform what is impossible.

Sec. 1462. CONDITIONS ARE DIVIDED INTO CONDITIONS PRECEDENT AND CONDITIONS SUBSEQUENT.—Conditions are divided into two classes: Precedent, and Subsequent.

When the condition is precedent the estate does not

come into existence until the condition is performed. Consequently it does not matter whether the condition is impossible, illegal or against public policy, it is always good in the sense that the estate upon condition precedent does not vest until the condition is performed. Therefore, if it is a condition that is impossible to perform, or the condition is illegal and void, the estate never comes into existence. Hence in considering a condition precedent it is unnecessary to ascertain whether it is against public policy or good morals, since such conditions must be performed before the estate vests; in other words, the condition precedent does not enlarge the estate, but simply prevents it from ever coming into the possession of the grantee.*

All that is necessary is to consider a condition precedent as one that is imposed upon the estate before it can vest, and when it is performed the estate vests.

A subsequent condition does not prevent the vesting of the estate, but it may restrict the enjoyment of the estate, and, in case it is not complied with, may terminate the estate by giving the grantor or his heirs the right to make a re-entry. Thus, every lease contains a condition that if the rent is not paid, the landlord may re-enter and take possession of the premises and terminate the lease, this is a condition subsequent. In this case, since the estate vests when the condition is subsequent, the tenant cannot be compelled to perform an impossible condition, or a condition that is against public policy to prevent being divested of his

*3 Dallas, 317; 14 Mass. 495.

vested estate, and such conditions, if imposed are, therefore, void.

Sec. 1463. A CONDITION SUBSEQUENT MUST NOT VIOLATE ANY RULE OF PROPERTY.—What is meant by a rule of property is, that there are certain incidents to certain estates, which belong or inhere to those estates, since without them the estate could not be granted. They are essential to the existence of the estate, and when a condition subsequent deprives the owner of any one of these it is repugnant to the grant, and void. Thus, in the case of a fee simple absolute, there inheres in such a grant these things: 1. The right to alienate. 2. The right to devise by will. 3. The right, in case it is not devised or sold, to have it descend to his heirs. All these elements are essential to a fee simple absolute, and any condition in the deed or will which deprives the grantee of the fee simple absolute of these essential rights is void, because it *violates a rule of property*. We say it violates a rule of property when it is repugnant to the grant.*

It is not a violation of a rule of property, however, to restrict the power of alienation to a particular class of persons. Thus, the right of alienation may be restricted to the members of the family, the sisters of the grantor, and their children, and the like.**

*Co. Litt. 223a; 20 L. R. Eq. 186; 62 N. Y. 462; 29 Mich. 78.

**L. R. 20 Eq. 186; 6 East, 173; 15 N. J. L. 386; 11 Pa. St. 370.

The rule against restricting the power of alienation applies to involuntary sales, as well as to voluntary sales. So that estates cannot be placed beyond the reach of creditors by conditions in a will.*

Efforts are sometimes made in wills, to provide for spendthrift devisees by conditions that the estate granted shall not be liable to seizure by the devisees' creditors for the debts of the devisees. This cannot be done, as the right of the creditors to collect their debts by sale of the lands devised to the debtor cannot be taken away.**

*Where a man conveys land by deed or will, that is a *voluntary* sale or gift; if it is sold upon execution for the payment of the owner's debts, it is an *involuntary* sale.

**75 Iowa, 343. In this case the testator granted certain lands to his son, declaring, "It is my will that he shall use, occupy and enjoy the lands during his natural life, but without the power or ability to mortgage the same." It was also provided that no creditor of the devisee should have the power to take the land upon execution. Execution was taken out by a creditor of the son, and upon its being returned unsatisfied, a petition was filed to reach the property or land on which he was placed. The court held that the son had a life estate, and that this life estate was subject to levy upon execution by his creditors.

But this is not the universal doctrine, and it has been held in several of the States, that a testator can, if he so chooses, create what is known as *spendthrift trusts*, making provision for a spendthrift son or daughter, by placing the estate beyond the reach of such spendthrift and beyond the reach of his or her creditors, so that the grantee can have the profits of the estate from year to year. This is exception to the rule just stated, and seems to have been allowed simply to protect a testator wishing to provide for the exigencies of a relative incapable of looking after himself.—91 U. S. 716; 133 Mass. 170; 111 U. S. 247; Gray, Restraints upon Alienation, Sec. 24.

Sec. 1464. THE USE OF LAND MAY BE RESTRICTED IN THE GRANT.—The use to which the land may be put can be restricted or limited in the grant. Thus, the fee may be conveyed upon condition that it shall not be used for certain purposes, as, for example, the sale of intoxicating liquors, maintaining a slaughter house, boiler house, soap factory, livery stable, and the like. These restrictions or conditions on the use, are held good if the party who has a right to enforce them has any interest in their enforcement.*

It has been held in this class of cases, that where the fulfillment of the condition is no longer of any value to the grantor, when he is no longer interested in its performance, the violation of the condition will not work a forfeiture.**

*100 U. S. 55; 41 N. Y. 442; 101 Mass. 512; 14 Kansas, 616; 25 O. St. 580. The case in the 100 U. S. 55, grew out of a grant to Colorado Springs, there being a restriction in the deed, that no building should be erected upon the premises for the sale of intoxicating liquors. This condition was violated, and the heirs of the grantor brought suit in ejectment to obtain possession of the premises. The Supreme Court held that the condition was a good one, the violation of which terminated the estate.

In putting a condition of this kind in a deed, it is well to couple it with a right of re-entry by the grantor or his heirs upon the breach of the condition. The reason for this is, that a violation of the condition does not terminate the estate, but simply gives a right to bring an action for breach of covenant, or breach of condition.

**83 Mich. 7; 75 Mich. 36; 100 U. S. 55. In the first case it appeared that a person had platted certain lands and had sold all the lots, but in each deed he put the proviso that, no saloon should be erected upon the premises. After he had sold all

A violation of the condition, does not of itself terminate the estate.*

Sec. 1465. AN ESTATE UPON CONDITION DISTINGUISHED FROM AN ESTATE UPON CONDITIONAL LIMITATION.—An estate upon condition is granted on the limitation, or condition, that the grantee do certain things, or refrain from doing certain specified things. If the grantee violates this prescribed condition, the grantor may re-enter and take possession. While an estate upon conditional limitation is one where the whole estate is given to the grantee absolutely, but upon the happening of a specified event it is to terminate absolutely. There is no re-entry necessary in this kind of an estate. The happening of the event is the end of the estate, and the fee goes immediately to someone else. For example, an estate is given to A so long as B remains in Rome. Here A has an absolute estate so long as B remains in Rome, but the moment B returns from

of the lots a saloon was built upon one of the lots. The court held that this was a good condition so long as the keeping of the condition was a benefit to the grantor or his heirs, but since the grantor had sold all of the lots, he was no longer interested in the performance of the condition, and therefore could not bring an action to recover the lot. But this case does not preclude the bringing an action for the breach of the condition by some one other than the grantor, as one of the several grantees, where the deeds are properly drawn, and the condition is made to be in favor of the several grantees. In such cases a bill in equity may be filed by the grantees to enforce the condition.

*4 Kent, Com. 127.

Rome the estate terminates, and no re-entry is necessary, since the estate ends on the happening of the event which limited its duration.

A proviso in a will that the estate devised shall terminate upon the happening of a certain event may be good as a conditional limitation, and void as a condition. For instance, land is devised upon condition that the devisee does not marry. Such a condition is void as against public policy, since the law favors marriages, and any such obstacle placed in the way of marriage generally is regarded as against public policy. But if the estate should be given to the devisee while he remains single, and to terminate upon his or her marriage, it is good as a limitation. The distinction between the two devises is, the distinction between a *condition* and a *conditional limitation*. In the first case the estate is held upon condition that the devisee does not marry, and that condition is void. In the other case the devisee is given an estate for an indefinite period, that is while remaining unmarried, and is not considered as a restraint upon marriage, since the will simply says so long as the devisee remains unmarried he shall have the possession of the estate, and upon marriage the estate terminates.*

Sec. 1466. A CONDITION IS TO BE DISTINGUISHED FROM A TRUST.—The courts in construing an instrument will sometimes construe the

*84 Me. 400. It occurs to us that this is a distinction without much difference, as the desire to retain the estate in either case would tend to restrain the devisee from getting married.

language used as creating a trust and not a condition at all. For instance, where land is given in a will to be used and occupied by a church, the court held that a *trust* was created for the use and benefit of the church, and that it was not held upon condition.*

Where land is deeded for public purposes, and to be used for that purpose only, upon condition that if it is not so used that the grantor or his heirs may re-enter, it is best to have the grant limited upon a *condition* rather than upon a *conditional limitation*. The reason being that a condition need not be performed within the rule against perpetuities, while the conditional limitation would be governed by such rule. Where an estate is granted upon a conditional limitation, the event which is to terminate the estate must happen within lives in being and twenty-one years thereafter. So that if a deed conveying land for public purposes, provides that the grantee shall hold the fee so long as he uses it for a public building, this is a conditional limitation, and must happen within the rule governing perpetuities, or the condition is void and the grantee will take the absolute title. But if the estate is limited upon a condition it is not within the rule against perpetuities.**

*84 Me. 386; Tiedeman's Leading Cases, 233.

**59 Pa. St. 335; Tiedeman's Leading Cases, 229. In this case the property was deeded to the Methodist Church and the deed provided that the premises should be occupied by the church, but upon failure to be used as a church, the grantor reserved the right to re-enter. It happened that the premises were occupied for several years as a church, when for some reason

Sec. 1467. NATURE OF AN ESTATE GRANTED UPON CONDITION.—When an estate is granted upon condition, the grantor does not part with his entire interest; he has reserved to himself and his heirs the right to re-enter upon breach of the condition, this portion of the estate remains in him, and the grantee takes subject to this right of re-entry. The grantor may, by subsequent conveyance grant the interest he has reserved, and when these two interests are united the estate becomes a fee simple absolute. So that the right to re-enter is something more than an interest which belongs to an individual, it is a right incident to the land itself, being an interest which the grantor did not convey. The possibility of re-entry is created or reserved in the same instrument which creates the first estate.

Sec. 1468. NATURE OF AN ESTATE UPON CONDITIONAL LIMITATION.—An estate upon conditional limitation differs from an estate upon condition in several particulars:

1. When the grant is upon a conditional limitation, the whole estate passes from the grantor and nothing is reserved. Where there is a condition subsequent the right to re-enter upon breach of condition is reserved.

2. When the estate is upon conditional limitation,

the Bishop abandoned the church and appointed no one to hold services there. An action was brought to recover possession of the premises, and the court held, that the moment the grantee ceased to occupy it as a church, the right to re-enter accrued.

the happening of the condition specified terminates the estate and no re-entry is necessary. Where the estate is held upon condition merely, the grantor may enter or not, just as he pleases, but if it is limited to cease upon the happening of a particular event, when the event happens it is the end of the estate.

3. In the case of an estate upon condition there are always persons in being, the grantor and grantee or their representatives, who can unite and pass a perfect title in fee simple; while in the case of an estate upon conditional limitation the whole estate passes to the grantee, and it being uncertain when the contingency may happen, there can be no one who can unite with the grantee and pass a perfect title.*

*In most cases the estate upon condition is to terminate upon the grantee dying without leaving issue him surviving. It seems to be a universal trait of mankind to desire that property shall be retained in the family. So that the grantor makes a will granting his land to his son in fee and to his heirs, and then puts in a proviso to the effect that if he dies leaving no heirs, or issue him surviving, the estate shall go to his brothers and sisters. This estate given in the first instance to the son, is an estate upon conditional limitation. The estate that goes over on the happening of the event, is called an *executory devise*. It is executed upon the happening of the event which terminates the first estate, that is, the failure of issue. It is a *devise* because it is an estate given in a will.

The third difference mentioned is the most important of the distinctions between an estate upon condition and an estate upon conditional limitation. It may be illustrated thus: Suppose A has the fee of land, and he grants this fee to B upon condition that he reside in a certain place. And there is a provision that A or his heirs may re-enter if B fails to perform the condition. A could then make another deed to B giving him the residue of the estate which he holds, then B

Sec. 1469. THE ESTATE OVER IN A CONDITIONAL LIMITATION IS TO BE DISTINGUISHED FROM A REMAINDER.—The estate over in a conditional limitation is not a remainder. A remainder is necessarily a part of the whole. At common law a fee could not be limited upon a fee, because a fee comprises the whole estate, and if the whole estate is granted there would be nothing left as a remainder. A grant of an estate in fee upon a conditional limitation that the estate shall cease and go to a third person on the happening of an event, does not give the third person to whom the estate may go a remainder, but only a contingency of receiving the entire fee upon the happening of the event.*

would have a perfect title. Suppose both parties die, B's heirs get his estate and A's heirs get the right to re-enter for breach of condition, and if all these heirs would unite in a deed to a third person he would get a perfect title. So that there are always persons in being who can unite and give a perfect title in the case of an estate upon condition. While in the case of a conditional limitation, the estate goes to A provided that if he die without issue the estate shall go to B and his heirs. A has the entire estate upon this conditional limitation. As it is not known whether A will die without issue; it is also uncertain whether B will be alive or dead when A dies. On the death of A without issue the estate goes over to the person then entitled to it; this person may not be in existence, since he may be born hereafter, consequently there are no persons in existence who can, by uniting in a deed, give a complete title in fee simple.

*3 Gray, 143; 63 Am. Dec. 725; Tiedeman, Leading Cases, 693. A devise to A for thirty years, remainder to B in fee, is an illustration both of the *particular* estate and a *remainder*. In this case the particular estate at the end of thirty years ceases by limitation. It is a definite and specified part of the

Sec. 1470. AN ESTATE UPON CONDITIONAL LIMITATION DISTINGUISHED FROM AN ESTATE TAIL.—An estate upon conditional limitation differs from an estate tail in this: that in an estate tail the ancestor has not parted with his entire estate, and upon failure of the designated heirs, the estate reverts, while in a conditional limitation, as we have seen, the ancestor or grantor has parted with his entire estate.

Sec. 1471. MEANING OF AN EXECUTORY DEVISE.—An executory devise is an estate given by will upon a conditional limitation, and which interest goes over to a third person upon the happening of the event which terminates the first estate created by the will.

fee; the remainder, which is the part of the fee left after carving out the estate for years, begins when the particular estate drops out. The particular estate may also be for an indefinite period, as a grant to A until B returns from Rome, and then to B in fee, here A has a life estate liable to be cut short by B's returning from Rome, and B has a remainder in fee.

But a grant to A and his heirs until B returns from Rome, and then to C in fee, does not give any remainder to C. A has a fee simple estate upon conditional limitation. The difference is, that in the one case you have given to A nothing more than a life estate, which is likely to be terminated upon B's returning from Rome; in the other case you have given A a fee simple liable to be terminated upon the happening of the event. In the first case there was a remainder over because A could not live forever, and the estate could only last so long as he lived; in the last case there is no remainder over, since unless B returns from Rome, A and his heirs have the fee, and what goes to the third person, if anything, is not a remainder, but the fee.

Since the tenant taking the estate upon the conditional limitation could not defeat the executory devise, or because the power to alienate is repugnant to a *base* or qualified fee, it is held that, if a testator gives and devises a qualified or base fee, and then gives the devisee power to alienate the land, he thereby defeats the executory devise over. That is, if by giving the right to sell, the testator has given the fee absolute, the courts hold that he cannot, also, provide for its termination, as this would be repugnant to the grant.*

It was a rule of the early common law, at first strictly adhered to, that if a fee absolute was granted, it could not be limited by any condition in the grant in derogation of the fee. But in 1620, in a case reported in 2 Croke, 590, the court held that an estate could be granted upon a conditional limitation. The facts in the case were: land was devised to A and to the heirs of his body, provided, that if he died leaving no issue him surviving, the estate should go to B. So far as the first part of this devise is concerned, it would apparently create an estate in fee tail general, but the proviso was that if he die leaving no issue him surviving, then the estate should go over to B. The court held that in such a case, the expression, "dying without issue him surviving" meant an indefinite failure of issue. That is, it is an extinction of the line, when there is no longer heirs of the body in existence, then the estate goes over. While if it means a

*5 Mass. 500; 10 Johns. 19; 100 N. Y. 287.

definite failure of issue, then it is not an estate tail. In this case, after the death of the testator A went into possession and suffered a common recovery. He had converted what he assumed to be an estate tail into a fee simple. After A's death the executory devisee, that is the one entitled to the estate under the terms of the grant upon A's dying without issue him surviving, brought an action to recover the property. The first question was, did this grant create an estate tail? If it did, it had been barred by a common recovery and converted into a fee. As we have seen the tenants in tail are barred by a common recovery, because their ancestor has received a judgment for the value of the land from or against his grantor, which afterwards bars and estops him and his heirs claiming any interest in this land. The judgment is also a bar against his descendants claiming any interest in the lands since the judgment is regarded as binding upon the party and his privies. But the court held that an *executory devisee* was not a party to the proceedings at all, either directly or inferentially, and consequently the proceedings in common recovery did not bar his right to the estate, if the first taker died without issue.

While at the early common law, and yet you cannot make a grant in fee, and at the same time annex conditions which are repugnant to the grant, as to grant a fee absolute and at the same time provide that the grantee shall not alienate the estate granted, yet it is held to be permissible to grant a fee and provide that

if the first taker does without issue, the estate granted shall terminate and the fee go over to a third person. If such an estate is created by will, we have seen that it is termed an *executory devise*, while if it is created under a deed, it is called a *shifting* or *springing use*. That is, the creation of such an estate could not be made by a direct conveyance at common law, and was made by way of a trust or use, by which land was conveyed to A for certain specified uses, and provided that if a certain event happened the particular use or trust should cease, and the lands be held to another use or trust. Thus if lands are granted to A and his heirs, for the use of B and his heirs, but in case A should die under age, then to the use of C and his heirs, the death of A under age, terminates the first use, and it shifts to C.

If land is conveyed in a deed to B and his heirs, and then upon the happening of a certain event it is to go over to a third person, such a condition would be void, because of the rule that you cannot limit a remainder upon an estate in fee simple.*

Sec. 1472. EFFECT OF A CONDITIONAL LIMITATION WHEREIN THE ENTIRE ESTATE IS NOT TO GO OVER TO A THIRD PERSON.—We have seen that if an estate is granted to A and his heirs in fee, upon the conditional limitation that if he dies without leaving any heirs him surviving (that is, a definite failure of issue, since if it was construed as an indefinite failure of issue it would be void

*118 Ind. 150; Tiedeman, Leading Cases, 311.

as contravening the rule against perpetuities), the estate shall go over to B, this limitation is good under the case decided in 1620. But suppose instead of giving the entire estate to B, the grant is, that so much of the estate as remains undisposed of shall go over to B. The question then is, what estate goes to B? The grantor has given to A the fee simple and also given him the power to convey the fee simple absolutely, whether he leaves any issue or not, but provides that if A does not sell it all what remains shall go to B.

The English cases held that this was nevertheless a good limitation, and this seems to be the law of the English courts now. But in America the weight of authority is, that the executory devise over, in such a case is void.*

*The first case decided upon this point was in the 5 Mass. 500; and that was followed in the 10 Johns. 19, decided in 1813. These two cases have been followed by a great number of American courts. The case in 5 Mass. 500, was based upon the case of Attorney General v. Hall, Fitzgiven, Rep. 314. In which case the testator left both real and personal property to his son. The real property was given to him under words which created an estate tail, without question. Now, under the rule of property that where both real and personal property are conveyed or devised by the same words, and such words create an estate tail as to the realty, the devisee takes the personal property absolutely. The court held that the language used created an estate tail in the land. The devisee suffered a common recovery and converted his title into a fee simple, and then died leaving a large part of his personal property unsold. The will provided that if he should die without issue the property should go to the Goldsmith Company, of London. The son had made a will, making his widow his executrix. The Attorney General for the use of the

Sec. 1473. HOW A WILL MAY BE DRAWN SO AS TO GIVE THE DEVISEE THE RIGHT TO SELL AND YET HAVE THE REMAINDER GO TO A THIRD PERSON.—The question arises as to how to draw a will allowing the devisee the power of disposition and yet have the remainder of the estate go over to a third person upon the happen-

Goldsmith Company filed a bill for an accounting of the personal property, and the question was what estate did the first devisee take under the will; and what interest, if any, went to the Goldsmith Company in the personal property that had been devised to the son, the son having died leaving no issue. The court held, first, that the devisee took an estate tail in the real property, and having suffered a common recovery had thereby converted it into a fee simple; second, that taking an estate tail in the realty gave him the personal property absolutely, and any restriction on such a gift was a violation of the rule of property as repugnant to the grant, and therefore void.

The Massachusetts court commenting upon this case said, since the power to dispose of the personal property was given, the executory devise over was void. But that was not the decision; which was that when the devisee was given the property *absolutely*, the executory devise was void. It was not void because the first devisee was given the power to sell, but because the power to sell was incident to the estate granted, and he could not be deprived of it by any limitation.

When the case in 10 Johns. 19, was decided, the court did not have before them the case of Atty. General v. Hall, but had before them a case in the 2d Vesey, in which this case was commented upon. As a result of this misunderstanding of the language of the court in the Fitzgiven case, the American courts have decided, and the decision is followed by the weight of authority, that where an estate is devised in fee, and then the devisee is given the power to dispose of it in fee simple absolute, and a provision is made that what is left shall go over to a third person, this proviso is void, and nothing will go over, the first devisee taking the absolute fee.

ing of an event. We have seen in the last section that this cannot be done under the ordinary limitation by the weight of American authorities. This may be done by giving the devisee a life estate, with remainder to his children, with power to alienate in fee, provided that if he dies without issue, the remainder over to his brother's children.

It being held, by the weight of authority, that an executory devise after a life estate, coupled with power to alienate in fee, is good.*

To carry out the intention of the testator and save the executory devise over, the court will, when the language will permit, cut down a devise in fee to a life estate with power to alienate. This will be done to effect the purpose of the testator, where possible, since if compelled to treat the first gift as a fee simple, the executory devise limited upon it is void.**

The condition upon which the property is to go over to a third person, must be a good one, and not void for any reason.***

The rule of property, that where an estate in fee simple is granted it carries with it the right to alienate it by deed or will, which cannot be limited by a condition curtailing these incidents is not enforced by the Scottish law.**** And the rule is sometimes ignored

*153 Mass. 542; 25 Am. Dec. 614; 153 Mass. 132; 25 Am. St. Rep. 616; 102 Mich. 148; 83 Ky. 233; 116 Pa. St. 490.

**132 N. Y. 2; 41 Hun. 125.

***6 Chan. Div. 1.

****1 Scottish App. Cas. 592.

where more important rights intervene, as where the courts have been compelled to sacrifice the rule of law or infringe upon human liberty, they have sacrificed the rule of law to protect liberty.

Sec. 1474. EXECUTORY DEVISES AND THE RULE AGAINST PERPETUITIES.—Executory devises or interests, as they are called, in their very nature, by putting off the vesting of an estate, tend to perpetuities, since they render the fee simple inalienable during the period for the happening of the event or contingency. It being impossible to determine who shall receive the estate over, at any particular time, it is impossible to convey a perfect title, and this ties up the estate so as to prevent free alienation, that is, it tends to perpetuities. It therefore became necessary at common law to fix some permanent rule prescribing the period or length of time that might be stated for the happening of the event or contingency, so that limitations within this rule would be good, and those without it, void.

This limit by the common law came to be fixed as a period of a life or lives in being and twenty-one years thereafter. This rule has been established by judicial decisions, but is as authoritative as any statute; though it is now substantially adopted as the statutory rule in the various American States. The common law courts had decided that a grantor could not limit a fee upon a fee, but that he might grant a fee and then provide that the fee should terminate upon the happening of a certain event and go over to a third per-

son. Then they established the rule that the event which would terminate the fee, must be an event which would happen within a certain time, and this time came to be judicially fixed at an early date, as a life or lives in being and twenty-one years thereafter. So that an estate can be given to A for life, remainder to B for life, then to C for life, and so on indefinitely, and then to X and his heirs in fee, provided that if X dies leaving no issue, then the estate should go to Z. At the common law you could grant the estate for as many lives as you saw fit and twenty-one years thereafter.* To which may be added the period of gestation, should gestation actually exist.

*“Executory interests other than those in remainder after or engrafted on an estate tail, must be so limited that, from the first moment of their limitation, it may be said that they will necessarily vest in right, if at all, within the period occupied by the life of a person in being, that is, already born or *in ventre matris*, or the lives of any number of persons described and in being, ‘not exceeding that to which testimony can be applied to determine when the survivor of them drops,’ and by the infancy of any child born previously to the decease of such person or persons; or the gestation and infancy of any child *in ventre matris* at that time, or within the period occupied by the life or lives of such person or persons in being and an absolute term of twenty-one years afterwards, and no more, without reference to the infancy of any person; or within the period of an absolute term of twenty-one years without reference to any life.”—Smith on Executory Interests, Sec. 706. See, also, *Beard v. Westcott*, 5 Taunt. 394; *Cadell v. Palmer*, 1 Cl. & Fl. 372.

“The law has fixed the following limit to the creation of executory interests: It will allow any executory estate to commence within the period of any fixed number of now existing lives, and an additional term of twenty-one years; allowing

Sec. 1475. AN EXECUTORY INTEREST TO BE GOOD MUST NOT CONTRAVENE THE RULE AGAINST PERPETUITIES.—In order that the condition may be good, which creates an executory interest, it must necessarily happen within the prescribed period fixed by the rule against perpetuities. So that if there is any possibility that the happening of the event will lap over this limit for any length of time, it is void.*

further for the period of gestation, should gestation actually exist. This additional term of twenty-one years may be independent or not of the minority of any person to be entitled; and if no lives are fixed on, then the term of twenty-one years only is allowed.”—Williams, *Real Property*, 318. “With regard to future estates of a destructible kind, namely, contingent remainders, we have seen that a limit to their creation was contained in the maxim, that no remainder can be given to the unborn child of a living person for his life, followed by a remainder to any of the issue of such unborn person: the latter of such remainders being absolutely void. This maxim, it is evident, in effect, forbade the tying up of lands for a longer period than can elapse until the unborn child of some living person should come of age; that is, for the life of a party now in being, and for twenty-one years thereafter—with a further period of a few months during gestation, supposing the child should be of posthumous birth.” *Id.*

See, also, 15 Pick. 104; 41 Mich. 562; 50 Mich. 428; 8 Mass. 37; 16 Johns. 399; 43 N. Y. 303; 14 Allen, 572.

The rule governing perpetuities was first definitely settled in the case of the Duke of Norfolk, 3 Ch. Cas. 1; 2 Chan. Rep. 229, decided in 1685. It is governed by statute in most of the United States.

*68 Mich. 355; 3 Gray, 143; Tiedeman, *Leading Cases*, 393.

“When a gift is infected with the vice of its possibly exceeding the prescribed limit, it is at once and altogether void both at law and in equity. And even if, in its actual event, it

Sec. 1476. AN ESTATE UPON CONDITION DOES NOT VIOLATE THE RULE AGAINST PERPETUITIES.—An estate upon condition does not violate the rule against perpetuities since there is always some one in being, who by uniting in a deed, can convey the fee simple to the land affected by the condition.*

should fall greatly within such limit, yet it is still an absolutely void as if the event had occurred which would have taken it beyond the boundary. If, however, the executory limitation should be in defeasance of, or immediately preceded by, an estate tail, then, as the estate tail and all subsequent estates may be barred by the tenant in tail, the remoteness of the event on which the executory limitation is to arise will not affect its validity."—Williams, Real Prop. 319; *Newman v. Newman*, 10 Simons, 51; Jarman on Wills, 233.

In addition to the limit already mentioned, another act of parliament was passed in the reign of Geo. III (39 and 40 Geo. III, c 98), forbidding the accumulation of income for any longer term than the life of the grantor or settlor, or twenty-one years from the death of any such grantor or settlor, or during the minority of any person living or in *ventre sa mere* at the death of the grantor, or during the minority only of any person who under the settlement or will, would for the time being, if of full age, be entitled to the income so directed to be accumulated. This statute was passed to prevent an accumulation of income as made by Mr. Thelluson, providing that the property should be allowed to accumulate during the lives of all his children, grandchildren and great-grandchildren, who were then living at the time of his death, for the benefit of some descendant living at the death of the survivor. See, *Thelluson v. Woodford*, 4 Ves. 221. Statutory provisions limiting the accumulation of income from property of a like character have been enacted in a number of the American States. *Vail v. Vail*, 4 Paige, 317; *Purd. Dig.* 1460.

*Suppose A grants the estate to B upon certain conditions; the next day, or any time, B can go to A and say, I want to

Sec. 1477. WHEN EXECUTORY DEVISES WILL BE HELD VOID.—The more common cases of executory devises which are held void as contravening the rule against perpetuities are those where property is given to A, remainder over upon the indefinite failure of issue. We have seen that if the estate over is given upon definite failure of issue, it does not violate the rule.*

Suppose an estate is given to A, and his heirs in fee provided that if A dies without issue him surviving, it shall go over to B. What does such a limitation mean? Does it mean that if A dies without children or issue, the estate shall go to B, or does it mean that the estate goes over only when the line of issue from A shall have become extinct, which might not

be released of that condition, and A has the power to release him from the operation of the condition, giving him an absolute fee simple. It is not required that the condition must be performed within lives in being and twenty-one years afterwards, since there is always some one in being who by uniting in the deed can convey a perfect title. But where the estate is granted upon a conditional limitation, there is no one in being who can join and pass a perfect title, therefore the event must be one which will happen within the period fixed by the rule governing perpetuities.

*26 Wend. 229; 29 Pa. St. 118; 76 Va. 140. "A definite failure of issue is when a precise time is fixed by the will for the failure of issue, as in the case where there is a devise to one, but if he dies without issue, or lawful issue living at the time of his death, etc. An indefinite failure of issue is the period when the issue of descendants of the first taker shall become extinct, and when there is no longer any issue of the line of the grantee, without reference to any particular time or any particular event. *Huxford v. Mulligan*, 50 Ind. 542.

be for an indefinite number of generations? Now if it means the former, it is a *definite* failure of issue that is meant, if it means the extinction of the line of direct issue, then it is an *indefinite* failure of issue, because the time when the line of issue shall become exhausted is exceedingly indefinite, and may continue for centuries. The death of A, on the other hand, is definite, and is bound to occur within a fixed time. The common law courts have held that such a devise means an indefinite failure of issue, and that the grant is void; unless there is something else to indicate that a definite failure of issue was intended.

So, if the condition upon which the estate is limited, is against public policy, or contravenes good morals, it is void. The condition must be one which the law will sanction and enforce.

Sec. 1478. HOW A CONDITIONAL LIMITATION IS CREATED.—The usual words creating a conditional limitation are, “as long as,” “while,” “during,” or “until,” and the like, yet the use of these words is not conclusive. The court will gather the intent of the grantor from the whole instrument.*

Sec. 1479. EFFECT OF A BREACH OF THE CONDITION.—In the case of a breach of the condition, where the grantor has reserved the right to re-enter, upon re-entering he takes the estate as of the time he granted it. That is, the testator takes the same estate back which he granted, and it is relieved

*29 Pa. St. 118; 76 Va. 140.

of the dower interest or any estate by curtesy or other estate which could otherwise attach to it. But if an estate upon conditional limitation is given to A, and he marries and has no children who can inherit, that is, dies without issue. Does his widow have dower? The estate which he had in the land terminates upon his dying without issue, yet the courts hold in such a case, that the dower interest will attach to the estate, because it was an estate in *fee*, and having attached to such an estate, it was not destroyed when the estate terminated, as in the case of a condition.

Sec. 1480. THE RULE AGAINST PERPETUITIES STATED.—The rule against perpetuities may be stated as follows: No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest.

The common law rule governing perpetuities is, that the condition must happen within a life or lives in being and twenty-one years and the period of gestation thereafter.

In Wisconsin, New York, Minnesota, and perhaps some other states, the rule against perpetuities has been modified by statute so that the condition must happen within the period of the lives of two persons in being at the time of the creation of the estate.* Where the common law rule has not been modified by

*Manice v. Manice, 43 N. Y. 303; 125 Ill. 399; Tiedeman, Leading Cases, 423.

statute, the rule is the same on both sides of the Atlantic.*

Sec. 1481. GRANTS THAT ARE NOT REPUGNANT TO THE RULE.—A vested interest is never repugnant to the rule against perpetuities, since it is not subject to a condition precedent, and the person who has the vested interest has also the right to alienate it.

So if a contingent remainder *must* become a vested remainder within twenty-one years after lives in being, such a contingent remainder will be good.**

If the remainder is vested it is good although the contingency may not happen which terminates the particular estate within lives in being, and twenty-one years thereafter.***

The conditions upon which the future estate may be terminated are as numerous and varied as the ingenuity of man may devise. A common condition is the failure of issue, and this may be a definite or indefinite failure of issue.

A limitation over upon the condition that the grantee dies without issue, or issue him surviving, was held to mean an indefinite failure of issue, making the limitation over void, except where it was saved by the peculiar incidents of an estate tail;**** and where

*St. Amour v. Rivard, 2 Mich. 294; Jackson v. Phillips, 14 Allen, 572; Hawley v. Northampton, 8 Mass. 37; Anderson v. Jackson, 16 Johns. 399; 102 Mich. 510.

**Irish Term Rep. 249; 19 Ch. Div. 520.

***19 Ch. Div. 520; 2 P. Wms. 28; 41 Mich. 572.

****"In the case of a devise to A and his heirs, and if he die

there is something else in the devise or grant to indicate that the ancestor had in mind that the failure of issue, should mean a failure of issue at the death

without issue, remainder to B, if the terms of the will were strictly followed, A would take an estate in fee simple, which would render the limitation to B, void as a remainder (because a remainder cannot be created after an estate in fee simple), and void also as an executory devise, because it would transgress the rule against perpetuities, as restricting alienation until after an indefinite failure of issue. But as the testator has shown an intention to benefit the heirs of A, as also the remainderman, courts restrict the estate limited to A, to an estate tail, upon which the limitation to B in remainder is good, as the failure of issue is the regular limit to an estate tail, and it takes effect as a remainder under the operation of the rule that wherever a limitation can take effect as a remainder, it shall never operate as an executory devise, while the rule against perpetuities is, at the same time, observed, because the right to suffer a common recovery is the inseparable incident to an estate tail, and the restriction upon alienation is, therefore, determinable at the option of the tenant in tail. Thus the rule against perpetuities is, in this instance, avoided by decreasing the estate of the devisee from a fee simple to an estate tail. . . . On the other hand, an estate to A for life, and if he die without issue, remainder to B, is, for the same reason, increased to an estate tail, for, as an executory devise, the limitation to B would be equally void as in the last case, and for the same reason."—Williams, *Real Prop.* 6th Am. Ed. 215n, citing *Doe v. Ellis*, 9 East, 382; *Romilly v. James*, 6 Taunton, 263; *Eichelberger v. Barnitz*, 9 Watts, 450; *Sonday's Case*, 9 Coke, 127b; *Langley v. Baldwin*, 1 P. Wms. 759; *Atty. Gen. v. Bayley*, 2 Brown Ch. 540.

"It is well settled that a devise in fee will be restricted, and a devise for life enlarged to an estate tail, by a gift over in case the devisee die without issue, unless there is something to justify a different construction."—Id. Citing, *Clarke v. Baker*, 9 S. & R. 434; *Deboe v. Lowen*, 8 B. Monr. 616; *Moorhouse v. Cotheal*, 1 Zabriskie, 480.

of the first taker, that is, a definite failure of issue.* This construction upon the phrase "dying without issue," or "without issue him surviving," was modified in England by act of Parliament (Stat. 7 Will. IV. & 1 Vict. c. 26, s. 29), to mean, when used in a will, a want or failure of issue in the lifetime or at the death of the party, and not an indefinite failure of issue. And the like modification of the common law holding has been made by statute in many of the American states.**

*"When, however, there is anything in the words of the gift or limitation, or in the context, to rebut this construction, and show that the testator meant a failure of issue in the lifetime of the first taker, instead of an indefinite failure, it will be rejected, and the limitation over construed as an executory devise in defeasance of a fee simple, and not as a remainder sustained by an estate tail."—Williams, *Real Prop.* 6th Am. Ed. 215n, citing *Pells v. Brown*, *Croke Car.* 590; *Porter v. Bradley*, 3 Term. 143; *Heerd v. Horton*, 1 Denio, 165; *Hall v. Chaffee*, 14 N. H. 215.

**Where the will contains a proviso that if the devisee dies without issue, or issue him surviving, or the like expression, there is some conflict as to the construction to be placed upon the language used. Thus in *Edwards v. Edwards*, 15 Beavan, 357, the Master of the Rolls held that the expression "dying without issue," in such a case meant the dying of the grantee within the lifetime of the testator without issue; that is, the expression meant the same as if the testator had said I give lands to A and if he dies to B, the intention being that if A died before the will took effect—before the testator's death—then the estate should go to B. Some American authorities follow this case. But in England, the rule is now settled that a gift to A, and provided A dies without issue, to B, means that if A dies at any time without issue, the estate goes to B, that is an indefinite failure of issue, and not a definite failure of issue by dying in the lifetime of the testa-

The limitation over on the condition of the grantee *dying without issue*, when the grant to the first taker is a fee, is held to create an estate tail, as is also the case when the first taker is given a life estate, in the one case the grant being restricted, and in the other enlarged, so that the estate over thereby becomes a remainder, and the rule against perpetuities is not violated since the tenant in tail has the right to bar the entail at any time, and thereby convert the estate into a fee simple*.

The contingency may be postponed for any number of lives in being, at the common law, and the persons designated need have no interest in the estate.**

tor. And this is the weight of the American authorities. 153 Ill. 368; 7 H. L. Rep. 408; 11 U. S. 526; 9 Allen, 516; 32 Mich. 47. To avoid this construction put upon the words "dying without issue," by the courts New York State adopted a statute which has been followed in Virginia, Indiana, Michigan, Missouri and perhaps other States, providing that when a remainder shall be limited to take effect upon the death of any person without heirs, or heirs of his body, or without issue, the words *heirs* or *issue* shall be construed to mean heirs or issue living at the death of the person named as ancestor. 3 Barb. 385; 3 Wend. 503; 2 Paige, 30. The court held that this statute meant that if a grantee died at any time before or after the testator without issue, the estate went over. 110 Mich. 237; 32 Mich. 47; 3 Barb. 385. But notwithstanding this statute the N. Y. courts have turned back and hold that this expression means that if the donee or grantee dies before the testator dies, without issue, then the estate goes over, otherwise not. 105 N. Y. 89; 131 N. Y. 55; Tiedeman, Leading Cases, 408. See *Gray v. Perpetuities*, 251; *Champlain*, suspension of power of alienation; 113 N. S. 340.

**Eichelberger v. Barnitz*, 9 Watts, 447; *Tetor v. Tetor*, 4 Barbour, (S. C.) 419.

**4 Ves. 227; 11 Ves. 112.

The only limitation suggested by the courts, independent of statutory limitations, is that the number of lives must not be so great, that it will be impossible to determine by evidence when the last survivor shall die.

A child in its mother's womb, in *ventre sa mere*, is considered as born, if it will be for its benefit to be so considered, hence the limitation fixed by the rule may include the period of gestation.*

The term twenty-one years may be taken in gross, without any reference to the infancy of the person to take the estate. In other words you can within the rule against perpetuities, suspend the power of alienation during any number of lives in being and for a period of twenty-one years thereafter, by having the estate go to trustees to be then distributed among the beneficiaries.** This term of years begins to run not from the execution of the will, but from the time the will takes effect, that is, at the testator's death.***

If the interest begins within the limit it is not obnoxious because it may extend beyond that period.

If the executory or future estate is too remote it is simply void, and the first estate becomes free from such limitation. Thus if an estate is given to A for life, remainder to his children who arrive at the age of twenty-five. And at the time the testator dies, A to whom this estate is given, is unmarried, the re-

*2 H. Bl. 399.

**1 Cl. & Fl. 372; 10 Bing. 140; 7 Cranch, 456; 3 P. Wms. 362.

***3 Hare, 1; 98 Mass. 65; 10 Hare, 106.

remainder over is void as being too remote. Since the condition is void the son takes the life estate, and the remainder over goes to his heirs.*

If the prior estate is for years or for life, the remainder over in case of the condition being void, goes to the heir or residuary legatee, depending in part upon the statute, and in part upon the construction of the deed or will.**

If the contingency upon which the future estate is to vest is stated in the alternative, it may be good in part and bad in part. Thus if a gift is to A for life, remainder to his unborn children if they reach the age of twenty-five, remainder to the children of B, it is void, because none of the children may reach the age of twenty-five within twenty-one years after A's death. But a gift to A, and if he dies without issue, or none of his children reach the age of twenty-five, remainder to the children of B, is good if he dies without issue, but is bad if he dies with issue under twenty-five. The reason being that the event of his dying without issue necessarily happens at the end of a life in being, while the other alternative, that the children shall reach the age of twenty-five, may not occur within twenty-one years after his death, and therefore if he dies leaving children under twenty-five it is void, if he dies without issue it is good.***

*3 Gray, 142; 102 Mich. 510; Tiedeman, Leading Cases, 418.

**36 Md. 163; 4 Ves. 732; 20 Wend. 457; 6 Paige Ch. 600.

***2 H. Bl. 358; 11 Hare, 372; 12 Cl. & Fin. 559.

CHAPTER VII.

LIMITATIONS TO CLASSES OF PERSONS.

Sec. 1482. GIFTS TO CLASSES OF PERSONS EXPLAINED.—A gift or devise may not be made to a particular person, but to a class of persons. A gift is said to be to a class of persons when it is to all those who shall fall within a certain category or description denoted by a general or collective formula, and who, if they take at all, are to take one divisible sum in certain proportionate shares. Thus a devise to the children of A, or to the children of A who shall arrive at the age of twenty-one, is a devise to a class.*

Sec. 1483. IN DETERMINING THE VALIDITY OF A DEVISE TO A CLASS IT IS THE SITUATION AT THE DEATH OF THE TESTATOR WHICH WILL GOVERN.—To determine

*L. R. 5 App. Cas. 714. In this case the devise was to all the children who should reach the age of twenty-one, and in the event that any of such children should die before attaining the age of twenty-one, to those children of such deceased child who should attain the age of twenty-one. The question was whether this devise was too remote to be valid. There was first a devise to a class, to all the children who arrive at the age of twenty-one, so far the devise was good, as all the children must attain the age of twenty-one within the rule, after the death of the testator. But the second provision, as to the grand-children would be too remote, as it might be more than twenty-one years after the death of the testator, and this would violate the rule against perpetuities.

whether a devise to a class is good or not, as regards the rule against perpetuities, the situation at the time of the death of the testator, that is, the time the will takes effect, is to govern. So that if all the members of the class are to be ascertained, and the share of each to be determined within the time limited by the rule, from the death of the testator, the devise is good; if not, it is bad.*

Limitation to grandchildren, or children of a living person as a class, when they shall attain an age greater than twenty-one years, is bad for remoteness, unless some one in the class is of the required age at the testator's death.**

When the limitation is made in a marriage settlement to children beyond the term of twenty-one years, the limitation is too remote. Thus if the settlement provides that the property shall be used for the benefit of the father or mother during their lives, and then to the children who arrive at the age of twenty-two, this is bad for remoteness, unless at the death of the first taker there is a child of the required age.

When the devise is confined to the grandchildren who are in being at the testator's death, it is good at whatever age they take. The reason for this is, that the devise is given to a class that is in being and

*7 Ch. Div. 693. Thus a devise to A, and his issue, and if A dies without issue, to the issue of B who shall attain the age of twenty-one. The devise is good because B's youngest son must attain the age of twenty-one within twenty-one years from B's death.

**102 Mass. 5; 123 Mass. 120; L. R. 6 Eq. 319.

known and determined, and as they are in being, the limitation is simply for lives in being and within the rule.*

When the gift is to such grandchildren, or other class as shall reach a particular age, and one or more of that class has reached the required age at the time of the testator's death, the class is closed, and the devise is not too remote. But no person can be included in the class who is not in being at the time of the testator's death.**

When a legacy is to children or grandchildren as a class after the prior estate, the gift is to the members of the class in existence at the time of the death of the first taker, and not at the death of the testator. Thus where A makes a will giving to his son John certain land for life, remainder to his children; and when the testator dies John has two children. Here the children that take are not the children in existence when the testator dies, but the children in existence when the estate should be distributed, and that is when John dies, so that all of John's children will take at his death. While if the grant had been to John's children who arrive at the age of twenty-five, and one of his children had been alive and of the required age at the death of the testator, the class would have been closed, and those two children would have taken.***

*3 M. & K. 550.

**10 Ch. Div. 204.

***1 Brown's Ch. Cas. 542; 1 Cox, 68; L. R. 10 Ch. Div. 262.

When the gift is to the children of A who shall reach the age of twenty-one, and if any child of A shall die under the age of twenty-one, leaving issue, to such issue on attaining the age of twenty-one, the latter taking the parent's share, there is a gift to a class composed of the children and grandchildren of A at twenty-one years of age. The maximum number of shares into which the gift may be divided is the whole number of A's children, but if A's children are under the age of twenty-one, the minimum number cannot be known, for such children may die before reaching the age of twenty-one, leaving issue who will not reach the age of twenty-one within the limitation, so that the devise is bad as contravening the rule against perpetuities. Therefore, when a devise is made to a class, the members of that class must be determined within the time fixed.*

Sec. 1484. RULES FOR DETERMINING WHETHER A DEVISE TO A CLASS IS INVALID.—To ascertain whether or not a devise to a class is bad, the following rules have been formulated:

This distinction is important, and if you want to provide for unborn children of a child of the testator, at the testator's death, you cannot do so by a provision that the property shall go to "my son's children," since this is a gift to those children of the son who are in existence at the time of the testator's death and does not include those who may be born thereafter.

*² Merrivale, 362; 22 Beav. 591; 26 Beav. 128; 11 Ch. Div. 555.

1. An executory devise is bad unless it be clear at the time of the death of the testator that it must, of necessity, vest in some one, if at all, within lives in being and twenty-one years thereafter.*

2. The will of the testator must be construed in the first instance without any reference to the rule against perpetuities, and having thus ascertained the true construction of the instrument, you are to apply the rule against perpetuities and ascertain if any of the provisions in the will are obnoxious to the rule.**

In America, the rule above stated may be considered as modified, so that the prevailing doctrine is, that you are to ascertain the intent of the testator, and if the will is capable of two interpretations, one of which would make the will void as being illegal, and the other not, the courts are to give it that construction which will make it legal. That is, the courts will favor that construction which will make the provisions of the will legal, as that is supposed to have been the real intention of the testator.

3. If the devise is to a single member constituting the class, who may by possibility be a person excluded by the rule against perpetuities, then no person whatever could take under it, because the testator has expressed his intention of including all, and not to give to one excluding the others.***

*12 Cl. & Fin. 546.

**1 Cox, 324; 8 Hare, 120; L. R. 5 App. Cas. 714; 11 Hare, 372.

***2 Hare, 120; 2 H. Bl. 358.

4. When the devise is to a class of persons, and any of that class may have to be ascertained at a period too remote, the devise fails, for the reason that the testator intended that the amount of each member's share should be ascertained by dividing the whole sum given, by the number of members in the class.*

5. When the gift is given to a class, but a definite and fixed sum is given to each member of that class, and cannot be increased or diminished by the increase or diminution of the members of the class, the gifts to each are separable, and those falling within the limit of the rule are good, the others bad. Thus if \$20,000 is given to each of five persons in a class, when they arrive at a certain age; here each gift is separate so that each member of the class stands on his own footing, so that the devise may be good as to some and bad as to others.**

6. If, when the devise takes effect, there is a member of the class who can take, the class is closed and the devise is not bad for remoteness, although the

*This is an important rule. As where a gross sum is given to A's children who shall arrive at the age of 25, you cannot ascertain how many will arrive at the age of 25 within the time limited. The whole will fails because you do not know what each of them will get. 12 Cl. & Fin. 546; 2 Merrivale, 363; 11 Hare, 372.

**1 H. L. Cas. 406; 30 Beav. 111. In the last case there was a bequest of \$2,000 to each of the testator's daughters, to each of them who should arrive at the age of twenty-four. It was held good as to the daughters who had arrived at the designated age within the rule.

gift may not be divided within the time fixed by the rule.

Sec. 1485. RULES FOR DETERMINING WHETHER OR NOT THE CLASS IS CLOSED.

—Whether or not the class is closed when the devise takes effect, depends upon certain rules of construction, as follows:

1. When there is a general devise to children or other persons as a class, the class includes only such persons that are in being when the testator dies, that is, when the will takes effect.*

2. When the devise is to take effect after the termination of a prior estate, only persons in being answering the description at the expiration of the prior estate, are included.**

*1 Ves. Jr. 405; 1 Ves. 391; 2 Atk. 121; 125 Mass. 536; 4 Paige, 47. In the case in 2 Atk. 121, the testator made a will giving lands to his widow for life, remainder to W. M., charged with \$400 to be paid within six months after the death of his wife for all the children of his sister Catharine, share and share alike. After the death of the testator another daughter was born to Catharine. The court held that such child did not take, only the children in being at the time of the testator's death were entitled to take. This rule does not exclude children born after the will is made and executed and before the testator's death, but does exclude the children born after his death.

**Where an estate is devised to A for life, remainder to his children, there is no trouble at all. But where the estate is given to A for life, remainder to B's children. A and B are both alive. At the time of the testator's death, B has two children; at the time of A's death, B has four children, and afterwards has two more children born to him. In such a case the class is closed when A dies, and the four children that are

3. When the gift is to a class generally, payable at a certain period, as to children when they arrive at a certain age, all children in being when the first child arrives at the designated age are let in; after born children are excluded.*

4. When the devise is given to each of several persons who shall succeed each other in some certain position, in office, for instance, none except those in being at the death of the testator can take.**

These rules of construction have been adopted by the courts to determine the intention of the parties who use certain words and phrases, by declaring in advance what meaning shall be given them.

then in *esse* take the devise, and those born afterwards do not take. 1 Cox. 327; 125 Mass. 536; 138 Ind. 506. In the case in 125 Mass. 536, the testator left his estate to two sons, providing that if the sons died without issue, the estate should go to the children of their two brothers and one sister, share and share alike, remainder to their issue. Both sons died without issue and at their death there were 23 nephews and nieces. The court held that each of these took a vested interest upon the death of the uncles, and that children born after that did not take.

*3 Brown, Ch. 401; 3 Ves. 730; 64 Mo. 469; 4 Mass. 97. In the case in 3 Ves. 730, the bequest was to the children of A when they severally arrive at the age of sixteen. At the testator's death there were six children, and the oldest was past fifteen, but not sixteen. Three children were born to A after the oldest arrived at the age of sixteen. The court held that the six children that were in existence at the time the oldest one attained the age of sixteen would take, and that those born afterwards were excluded.

**8 Cl. & Fin. 611; 5 Mod. Rep. 232; 10 Simons, 495.

CHAPTER VIII.

OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE.

Sec. 1486. THE FREEHOLD ESTATES OF DOWER AND CURTESY.—There are two freehold estates created for the benefit of the family. The rules of law applicable to these estates are only intelligible by remembering that the family was originally the unit of government, and the rules of law aimed to assist the head of this family in performing the duties which the system of government imposed upon him. These two freehold estates, known to the early common law, and still created by operation of law, are: 1. The estate of *dower*, and 2. The estate of *curtesy*.

Sec. 1487. DOWER DEFINED AND EXPLAINED.—Dower is the estate which the widow is entitled to and which is assigned to her out of any freehold of inheritance of which her husband was seized during coverture and which her issue might possibly inherit. It is essential that the estate should be a freehold of inheritance, and that the issue born of the wife might possibly inherit the same.

This estate of dower assigned to the widow, at the common law, is a life interest, in severalty, of one-third of the husband's lands, tenements and hereditaments, and did not include personal property, but did

include such fixtures that were immovably attached to the freehold.*

In some states the statutes have modified, and in others abolished dower. In some states the widow inherits one-third of her husband's estate. In some of the states it depends upon whether or not there are children, if there are no children, the wife inherits the husband's estate.

By the Ordinance of 1781, the common law right of dower was established in the North West Territory.**

Sec. 1488. THERE ARE THREE ESSENTIALS TO THE ESTATE OF DOWER.—There are three essentials to the estate of dower, these are: 1. Marriage. 2. Seizin of the husband. 3. Death of the husband.

1. The marriage must be a legal marriage as distinguished from a void marriage. Thus where one of the parties is insane at the time of the marriage, it is void, and the widow in such a case would have no right of dower. If the marriage is merely voidable, as for want of sufficient age, if the parties continue to live together until they have reached the legal age, the marriage becomes valid, and the widow would be entitled to dower.

2. If at any time during coverture the husband became seized solely in his own right, of any estate of inheritance, that is, a fee simple or fee tail, in lands

*2 Bl. Com. 131; Lit. ss. 36, 53; 4 Kent. Com. 68.

**1 Mich. 1; 11 Ohio, 219.

to which any issue, which the wife might have had, might by possibility have been heir, she from that time became entitled, on his decease, to have one equal third part of the same lands allotted to her, to be enjoyed in severalty during the remainder of her life.* Seizin in law is sufficient, and seizin in deed is not necessary. Otherwise in the case of an estate by curtesy.

3. The husband's death may be a natural death, or a so-called legal or civil death, as by becoming an outlaw, or entering a monastery at common law.

At common law the wife of an alien was not entitled to dower because an alien could not hold property. But in most if not all of the American states, an alien can hold property, and hence the widow of such a person would be entitled to dower.**

The wife has no interest in the lands during the lifetime of her husband, and in this matter dower differs from curtesy. At common law, the husband had actual control of his wife's property during coverture. So far as dower is concerned it is an interest, and becomes an estate upon the death of the husband. During the life of the husband it is an inchoate estate, and does not become a vested interest until his death. It being a mere possibility, her deed passes no title; and she could not release her right to a stranger, only to the owner of the fee.***

*1Williams, Real Prop. 233.

**1 Cowen, 89; 5 Cowen, 713; 11 Ohio, 219.

***55 N. Y. 4; 9 Paige, 201.

Sec. 1489. NATURE AND INCIDENTS OF A DOWER INTEREST BEFORE IT HAS BECOME VESTED.—Until dower becomes vested, it is subject to the control of the legislature, and may be changed, modified or abolished without violating any constitutional provision.

But the interest which the wife has is so far a valuable interest as to be a good consideration for a deed, though it may be destroyed by the legislature without any remuneration whatever, since it is not regarded as property within the meaning of the constitutional provision. It is not regarded as a property right but a mere inchoate interest which may ripen into an estate if the wife outlives the husband. It is an interest which the law gives her to support her family after the death of the husband. It being a provision for her maintenance after her husband's death, the law would not permit him to sell his land and deprive her of her interest. But if she united in a deed conveying her husband's land she was estopped from claiming dower therein.*

Sec. 1490. HOW CAN A WIFE RELEASE HER DOWER WHILE HUSBAND STILL SEIZED?—In some states as Michigan, the wife may make an arrangement by which she deeds to him all her interest as to dower, so that the husband can pass a clear title by his individual deed. But this is unusual. A divorce usually bars the right of dower, but in Michi-

*46 Me. 9; 17 Ind. 517; 81 N. C. 267; 37 Mich. 563.

gan, a wife divorced through the fault of her husband, is still entitled to dower.

Sec. 1491. TO WHAT DOES THE DOWER ATTACH.—The widow is dowable in mines if they are open and being worked, but she is not entitled to open new mines. The theory being, that she is dowable in the lands in the condition that they were at her husband's death.*

At common law the widow had dower in all of her husband's land, no distinction being made between cultivated and woodland. In America the question has been raised in most of the states whether she was dowable in woodland, and the decisions of the question have not been uniform. In Maine, New Hampshire and Massachusetts, dower in woodland is not allowed.** In most of the other states dower in woodland is allowed the widow.***

In the case where wild lands have been sold by the husband, and have been subsequently improved by the grantee, the widow is entitled, under the Ohio rule, to dower in them as of their value at the time of the assignment of dower, less the value of the improvements.**** Under the New York rule, also the common law rule, the widow is entitled to dower in the lands of her husband which he had sold and which had been subsequently improved,

*1 Taunt. 402; 1 Cowen 460; 10 Pick. 460.

**2 N. H. 56;

***2 Douglas, 141; 17 N. J. 32; 10 Wend. 480.

****Allen v. McCoy, 8 Ohio, 418.

as of their estimated value at the time of the sale, without any reference to the improvements or enhancement in the value of the lands.* In Pennsylvania, the wife is not entitled to any advantage by reason of improvements added to the land by the purchaser, but she is entitled to the improvements in the general surroundings of the land and country, by which the general value of all land is increased, and this rule is followed in other states.**

Sec. 1492. NATURE AND QUALITY OF THE ESTATE SUBJECT TO DOWER.—The estate of the husband to entitle the wife to dower must be a *freehold* estate that the issue of the wife might by possibility inherit.***

The estate of the husband must confer a right to an immediate freehold, that is, there must not be any intervening freehold. Thus if an estate is given to A for life, with remainder to B, here if B dies, his widow is not entitled to dower if A's life estate is still outstanding. If A dies his widow is not entitled to dower because the life estate which he had is not a *freehold of inheritance*. But if A dies first, B's widow

*Humphrey v. Pinney, 2 Johns. 484; Shaw v. White, 13 Johns. 179; Walker v. Schuyler, 10 Wend. 485; Tod v. Baylor, 4 Leigh (Va.), 509.

**Thompson v. Morrow, 5 Serg. & Rawle, 289; Shirley v. Shirley, 5 Watts, 328; Dunseth v. Bank of U. S., 6 Ohio, 76; Manning v. Laboree, 33 Me. 343; Summers v. Babb, 13 Ill. 485.

***Co. Litt. 40; 5 N. Y. 304; 1 Wash. 153.

would be entitled to dower, because the life estate had dropped out before B's death.

So if the husband has the life estate and afterwards acquires the remainder, and then dies, dower attaches; as the two estates merge and he becomes possessed of a freehold of inheritance.*

Not only an intervening freehold will prevent dower from attaching, but if there is a possibility of a freehold estate intervening, it will not be subject to dower. Thus in the case of joint-tenants, the estate of each joint tenant goes, upon the death of one of them, to the survivor or survivors; so if there are two joint tenants and one of them dies, the widow of the deceased tenant has no dower, but the surviving joint tenant taking the whole property by right of survivorship, on his death, his widow would have dower in the whole estate.**

The husband must be seized either in deed or in law during coverture. This was the rule of the common law, and was enforced both by courts of law and equity. This doctrine was carried so far that if a man was seized in fact and disseized, and then married and died before he had acquired seizin again by the eviction of the disseizor, his widow was not entitled to dower. This rule of the common law has been modified by statute so that if a person is evicted by a wrong-doer, and while he is out of possession

*1 Washburn, Real Prop. 155; 50 N. Y. 161.

**1 Wash. Real Prop. 156; Parke on Dower, 72.

he marries and dies before again obtaining possession, the widow is still entitled to dower in the premises.

A wrongful seizin of the husband entitles his widow to dower as against all persons claiming under such tortious seizin.

When lands are purchased and a purchase price mortgage is given back to the grantor, the mortgage and the deed is considered as one transaction, and the husband is regarded as taking the land as encumbered by the purchase price mortgage, and the mortgagee's lien is not subject to the widow's dower. That is, the widow is only entitled to dower in the land after the mortgage is satisfied.

If the husband purchases land on borrowed money and gives a mortgage to the person furnishing the purchase price, this is regarded as two distinct transactions, and the title vests in the purchaser absolutely. So that the mortgagee's lien for the money advanced would be subject to the wife's right of dower in the whole estate.* These rules are not of much significance now as in such cases the wife is required to join in the mortgage deed to secure the purchase price, and release her dower as regards such mortgage.

In regard to dower in estates acquired by exchange, it was the rule at the common law, that the widow of either party had the right to elect as to which of the lands exchanged her dower should attach, but she could not have dower in both parcels. Each widow might elect to have dower in the same parcel, but they

*45 Me. 193; 119 Mass. 519; 13 W. Va. 666.

could not have dower in both.* This rule of the common law has not been adopted in all of the States. The rule being in some states that both parties may be regarded as purchasers, and the widow of each would have dower in both parcels of land.**

To bring a case of exchange within the meaning of these statutes, and the rule of the common law, the mutual transfer must be equal. It must be a trade and not a purchase. That is, A must transfer one parcel of land to B in exchange for a parcel belonging to B. If a price is fixed on each parcel, and then the exchange is made, it is a purchase and not an exchange.***

While it is a maxim of the law, that a derivative estate can last no longer than the original estate out of which it was carved, and from which it arose, yet, in the case of dower, this rule seems to be contravened. Thus if an estate is given to A and the heirs of his body, and A dies without issue, terminating the estate tail. Here the widow's dower attaches the moment the estate is transferred to A. Though this right to dower is part of the estate given to A, it may outlast his death and the termination of his

*1 Greenleaf, Real Prop. 163, Sec. 12.

**1 N. H. 65. In Michigan the statutes provide that the widow shall not be entitled to dower in both parcels, but shall make her election, the same as at common law, and then provides that if she does not make her election within one year from her husband's death, she shall be presumed to have elected to take dower in the parcel which her husband received in exchange for the land he deeded.

***1 Barb. 633.

estate, and last until the widow's death, because it is considered as an incident to such an estate. This is true of estates of such a character granted upon conditional limitation, but not of estates upon condition. An estate upon condition is an estate granted to be held until the condition happens when the grantor has the right to re-enter. Upon such re-entry the grantor takes the estate as of the day he granted it, and free from all dower incidents.*

Sec. 1493. HOW LANDS MAY BE DISCHARGED OF THE RIGHT OF DOWER.—At the common law the method of barring dower in lands sold by the husband was by levying a fine, in which the wife was separately examined.** The plan also grew up of conveying the land to uses, as to convey land to the purchaser and his heirs to the use of the purchaser and a trustee and the heirs of the purchaser.*** It was also permitted by the Statute of Uses (27 Hen. VIII, c. 10), to bar dower by a *jointure*, or settlement, agreed to and accepted by the intended wife, previous to marriage, which settlement was in lieu of dower. If such a jointure be made after marriage, the wife may elect between her dower and her jointure.**** In England, by the Act of 3 and 4 Will. IV., c. 105, becoming operative on the first of Jan.,

*3 Halstead, 241.

**Williams, Real Prop. 233.

***Williams, Real Prop. 234; 1 Metc. (Ky.) 670; 1 Ala. 362; 5 Paige, 318; 19 Mo. 487.

****Williams, Real Prop. 235.

1834, the statutes and rules relating to dower were changed, and the husband given control over it, to the extent that dower is barred in any lands which he shall absolutely dispose of in his lifetime by deed or by will, and the widow can claim no dower as against the debts and contract obligations of her husband, so that the widow has no claim to dower except as against the heir at law.*

In America, the statute of Henry VIII, above referred to, has been substantially re-enacted in most of the states.** In Rhode Island, Virginia, Ohio, Kentucky, and Missouri, if the jointure or other estate conveyed in lieu of dower was made while the woman was an infant or after marriage, she may, after her husband's death, waive it and claim her dower. In Maine, Massachusetts, Indiana and Arkansas, that no jointure will bar the dower, unless made before the marriage and with the consent of the wife expressed in the deed, and such are substantially the provisions in Connecticut and Delaware, and, it is believed, in most of the states.*** Where the will of the husband contains a provision for the wife's benefit, the doctrine of *election* arises; that is, the wife in some cases is required to elect whether she will claim her dower in opposition to the will, or accept its provisions in place of it. Thus in Delaware any devise,

*Williams, Real Prop. 236, 237.

**Kennedy v. Nedrow, 1 Dallas 417; Hastings v. Dickinson, 7 Mass. 155.

***1 Greenleaf's Cruise, 195, 200; Rev. Stat. Ohio, Sec. 4189.

and in Pennsylvania any bequest or devise, will be taken to be in lieu of dower, unless the testator declare otherwise, the widow still having her election. In New York, New Jersey and Tennessee, any testamentary provision defeats the dower unless within a certain time the widow dissents, as also in Massachusetts, Ohio and Alabama, unless it plainly appear by the will that the testator intended she should have both.* So divorce, may bar the offending party of dower in the other's land.**

The usual method of barring dower in lands which the husband desires to sell, is for the wife to join in the deed, and therein release and relinquish her right to dower. In some states it is necessary to examine the wife apart from her husband in taking the acknowledgement of such a deed, but in other states this is not necessary.

Sec. 1494. THE LAW WILL NOT GRANT DOWER OUT OF A DOWER ESTATE.—It is a rule of law that a person cannot have dower out of dower. Thus, if a father is possessed of three acres of land, and he has a son, and each are married. If the father dies leaving a widow, she becomes entitled to a life interest in one acre of the three, the other two acres descend to the son. If the son dies before the previous dower estate terminates, his widow will be dowable only in the two acres which have descended to him. The son being seized only of two acres,

*Williams, Real Prop. 6th Am. Ed. 236 n.

**Rev. Stat. of Ohio. 5699, 5700.

the other acre being his in remainder on the termination of the previous life estate.*

Sec. 1495. OF THE ESTATE BY CURTESY.

—The estate by curtesy, or, at common law, the estate by the curtesy of England, is the life estate which the husband has in the real estate of the wife where the wife was seized of an estate of inheritance, and bore him issue, born alive, capable of inheriting such estate.

By the rules of the common law, the husband being the head of the family, had the right of possession and the emoluments arising from his wife's property during her life, this being an incident to the marriage relation at the common law.

In addition to this common law right, if there was issue born alive, capable of inheriting the wife's estate, the husband became entitled to a life estate in the property of the wife after her death. This right commenced at the birth of issue capable of inheriting and became complete or consummate upon the death of the wife. In case no issue were born alive capable of inheriting, upon the death of the wife her real property went to her heirs at law, the husband having no further claims upon it.** But if children were born alive, though they did not continue to live, the husband had the right to retain the possession of the en-

*Co. Litt. 31a.

**2 Bl. Com. 126; Litt. ss. 35, 52; Williams, Real Prop. 227, 228.

tire property and the profits arising therefrom during his life, and is called a tenant by curtesy.

Sec. 1496. CURTESY IN THE UNITED STATES.—Unless abolished by statutes for the express purpose, or by implication from statutes known as “Married Women Acts,” giving to married women the same control over their property as they had before marriage, curtesy exists in the states as at common law. Some of the states hold that the acts enlarging the rights of married women over their property are inconsistent with the estate of curtesy, and therefore abolish such estate by inference.* In other states curtesy has been abolished by express statutes. In Ohio, the right of curtesy is abolished and the husband is given the right of dower in his wife’s real property to the same extent as she has dower in his.**

Sec. 1497. THE ESTATE BY CURTESY MAY BE SAID TO EXIST IN TWO STAGES, INITIATIVE AND CONSUMMATED.—The estate of curtesy exists in two stages: 1. In the *initiative*, upon the birth of issue capable of inheriting. 2. *Consummated*, upon the death of the wife.

Some of the courts have intimated that the estate by curtesy begins at marriage; this is a mistake, there is no estate at all until the birth of issue, and after issue born there exists an estate separate and distinct from the right of possession of the wife’s estate

*5 Cowen, 74.

**Rev. Stat. Ohio, 4194-1.

given by virtue of the marriage relation. The estate of curtesy ends only with the husband's death, and may be seized on execution to satisfy claims against him. If sold upon execution before the death of the wife, then, it continues until the death of the husband, but if the husband dies before the wife, the estate ceases upon his death. The purchaser of such an estate acquires no greater interest than the husband had.*

Sec. 1498. TO CREATE AN ESTATE BY CURTESY THE FOLLOWING THINGS MUST EXIST:—1. There must be a legal marriage. But if the marriage is a voidable one, and never avoided, it will sustain the estate by curtesy. While if the marriage is void no estate by curtesy arises.**

2. Issue capable of inheriting the estate must be born alive. Not only must there be an estate of inheritance, but an estate capable of being inherited by the wife's children must exist. So that if an estate is given to a woman, and to the issue of the husband she now has, and he has issue, the husband is then entitled to curtesy. But if the husband indicated dies, and the woman marries again and has children to her second husband, and then dies, the second husband is not entitled to curtesy in the lands since the issue born are not capable of inheriting the estate. There must

*100 Ill. 347; 5 Cowen, 74.

**Co. Litt. 38.

be a freehold in the wife which her issue are capable of inheriting.*

If the child is born alive it does not matter how long or how short a time it lives. It is simply necessary to the vesting of the estate in the husband that the child be born alive.

It has been held that if a child is born out of wedlock and the parties afterwards intermarry, and if under the laws of the place of marriage the offspring are made lawful, then the right of curtesy exists, and vests in the husband.**

Sec. 1499. TO WHAT ESTATES CURTESY WILL ATTACH.—The estate by curtesy embraces all estates of inheritance held by the wife which her issue are capable of inheriting. That is, the estate attaches not only to absolute estates, but to qualified and determinable estates. The law being the same

*2 Bl. Com. 127. It was formerly the rule that the issue must be born during the life of the mother, and if the mother died before the child was born, or delivered, then there was no estate by the curtesy. The reason for the rule was that there was no issue during the marriage relation, since the relation was dissolved by the death of the wife. But this rule has given away to the one which holds a child in existence, though unborn, to have the same rights as though born, and to so consider it where it was for the benefit of the child. So that though the child be born after the death of the mother, if it is born alive, curtesy arises. Co. Litt. 29b; Tudor, Leading Cases, 65; 2 Paige, 35. In Pennsylvania, since 1833, by Statute, the husband is given curtesy though there be no issue of the marriage.

**9 Ala. 965.

as to estates by curtesy as to dower estates.* The same distinction is made between estates upon condition and estates upon conditional limitation that is made in the case of dower. The estate by curtesy attaches to the estate upon conditional limitation, but does not attach to an estate upon condition.

The estate of curtesy attaches to equitable estates of inheritances, though the husband is not entitled to curtesy in a mere equitable right.**

Seizin is one of the essential requirements of an estate by curtesy. At common law the seizin of the estate must have been by deed, seizin in law not being considered sufficient to support the estate. The reason for the rule was that it was the duty of the husband to take actual possession of the property of the wife, as she was unable to do it herself, and this duty being obligatory on the husband, if he failed to perform it, he could not have curtesy. This rule is modified by state statutes.*** But the seizin of the wife, whether seizin in law or by deed, must be the seizin of a present estate. There can be no curtesy in a remainder or a reversion.****

Sec. 1500. THE ESTATE OF CURTESY CANNOT BE BARRED BY WILL OF THE PERSON GIVING THE LANDS TO THE WIFE.—The right of the husband to curtesy in his wife's lands

*13 Ala. 723.

**Williams, Real Prop. 228.

***13 Ala. 793; 8 Humphrey, 298.

****40 Miss. 161; 8 Allen, 425.

cannot be barred by the will of the grantor or testator by which the wife become possessed of the estate, since curtesy is an inseparable incident of the freehold estate which attaches by a rule of law and cannot be contravened by the wish of a private person.*

Sec. 1501. AN ESTATE BY CURTESY MAY BE BARRED BY AN INTENTION SO EXPRESSED WHEN LANDS ARE CONVEYED IN TRUST TO USES.—A trust may be so created as to exclude the husband's right of curtesy. It is important to observe what provisions in a trust instrument will be held to show an intent to bar curtesy. If the estate is given directly to the wife without the intervention of a trust, it is not a question of intent, but one of power, as the courts hold that when a fee is created the grantor has not the power to make such a limitation. But if the estate instead of being given directly is conveyed in trust to a third person for certain uses, the grantor has the power to bar the dower or curtesy if he uses language which shows an intent to do so. So that in such cases the question for the court is to determine the intent of the grantor from the language used, and if it was the intent to bar dower or curtesy it will be barred.**

In some of the states it is held that the estate of curtesy is not barred, unless the language used in the settlement itself bars the estate by curtesy. That is,

*37 Pa. St. 391; 100 Ill. 347.

**30 N. J. 686; 7 Johns. Ch. 229; 30 Ga. 303.

that no general language will be construed to deprive the husband of the estate which the law gives him.*

Sec. 1502. INCIDENTS OF AN ESTATE BY CURTESY.—The estate by curtesy is a life estate, and it may be leased or assigned by the tenant in curtesy for the full term and without his wife joining in the conveyance. The purchaser of such an estate acquires all the rights which the husband would have, in case he had not sold it.** The estate of curtesy is also liable for the husband's debts. But the estate on coming to the husband is subject to debts of the wife.***

A divorce obtained by the wife against the husband bars the estate of curtesy, so that a purchaser of the estate from the husband would have no claims in it though he purchased before the divorce was granted.

The most usual method of barring the estate by curtesy is for the husband to join his wife in a deed, in the same manner that a wife may bar her right of dower by joining in a deed with her husband.****

*6 Mo. App. 549.

**31 Ill. 219; 22 N. H. 491.

***54 Miss. 50; 9 Vt. 26; 8 O. Pa. St. 391.

****76 Pa. St. 280. In a number of States including New York and Michigan, it is held that the Married Woman's Acts abolished by implication the estate by curtesy, so that in such States there is no estate by curtesy.



CHAPTER IX.

OF JOINT TENANTS AND TENANTS IN COMMON.

Sec. 1503. MEANING OF AN ESTATE IN JOINT TENANCY.—By joint tenancy is meant that two or more persons hold the title and profits of land, as respects all other persons, as though they constituted one single person. As between themselves they have distinct rights, but such rights are equal in every respect, each having the same rights as regards the estate as another. A joint tenancy is therefore said to be distinguished by unity of *possession*, unity of *interest*, unity of *title*, and unity of *time* of commencement of such title.*

Any estate may be held in joint tenancy, and wherever lands are given simply to A and B, without further words, they become at once joint tenants for life. They are regarded as one individual, as respects other persons, and the life estate would continue so long as either of them was alive. As between themselves, each would be entitled to share equally in the rents and profits while both lived, but on the death of either one the interest of the deceased joint tenant, instead of going to his heirs or representatives, passes to the survivor, who becomes entitled to the whole estate by right of survivorship during the residue of his life.*

*2 Bl. Com. 180; Williams, Real Prop. 132. Joint tenancy was so favored at the common law, as the feudal system

An estate in fee simple may also be given to two or more persons to hold as joint tenants. In such cases the land is granted them and *their heirs*, but because of the rules of survivorship, the estate will descend to the heirs of the survivor instead of to the heirs of all of them, if the joint tenancy continues so long. Thus, if an estate is given to A, B, and C, and their heirs, the three persons are seized of the entire estate. This estate as a whole will pass to the survivor or survivors on the death of either of the joint tenants, and on the death of the survivor of the three, will pass to the heirs of such survivor, to the entire exclusion of the heirs of those who previously died.*

A joint tenancy in fee simple is more common than joint tenancies for life or in tail. The estate is chiefly created where it is desired to have the estate vest in trustees, who are ordinarily made joint tenants, the whole estate vesting in the survivor for the uses and purposes of the trust.

The joint tenants are not regarded as having any separate interests, except as between themselves, and consequently have no estate which they can devise by will, while two or more of them are living. On the death of the survivor, the estate will descend to the heir at law, or to the devisees of such survivor.

aimed to keep the title in one person, that if it was desired to create an estate by tenancy in common, it was necessary to indicate in the deed, that the estate was to be held as tenants in common and not as joint tenants.

*Co. Litt. 184a; Litt. s. 280; Williams, Real Prop. 134.

Sec. 1504. INCIDENTS OF AN ESTATE IN JOINT TENANCY.—The joint tenants being regarded as but one owner, their estate or interest must be created at the same time; that is, A and B as joint tenants, must receive the estate by the same grant, and not come into their interest at different times.* Each tenant is regarded in law as having the whole of the estate, so that if it was desired to transfer the interest of one joint tenant to another it could not be done by livery of seizin, as he already had delivery, the proper form was to make a release by deed, which operated as an extinguishment of the rights of the grantor.**

Sec. 1505. SEVERANCE OF AN ESTATE BY JOINT TENANCY.—The incidents of survivorship as to estates by joint tenancy might be put an end to or *severed* during the lifetime of the joint tenants, as each joint tenant might dispose, in his lifetime, of his share of the lands held in fee simple, by any of the usual modes of conveyance except by will. But if the tenant died without making such a sale the land went to the survivor or survivors free from his share or moiety. By a sale in the lifetime of a tenant, the share held by him was regarded as severed or cut off from the estate, and discharged from the incidents of joint tenancy,

*2 Bl. Com. 181. An exception to this rule existed in favor of a conveyance by virtue of the statute of uses, and perhaps in the case of estates created by will. Williams, Real Prop. 135.

**Co. Litt. 169a.

and passes to the grantee to be held as a tenancy in common.*

As early as the time of Henry VIII, by statute it was permissible for one tenant to compel his companions in joint tenancy and tenancy in common to submit to a *partition* of the estate between themselves according to the value of their shares, so that each might hold his portion in *severalty*. This method has been simplified and is enforced in the equity courts, the tenants may also make mutual deeds or releases, and thus apportion the joint estate between themselves in *severalty*.

Sec. 1506. EFFECT OF MODERN STATUTES ON AN ESTATE BY JOINT TENANCY.—Statutes in the various States and in Canada, have been passed abolishing the main feature of joint tenancies, the right of survivorship, or the *jus accrescendi*, except in some cases, as regards estates so granted to trustees, husband and wife, partners, and the like.** In Virginia and Pennsylvania the statute abolishing survivorship in joint tenancy make an express reservation as to trust estates, since in these estates it is desired that the interest of the deceased trustee shall pass to the survivor or survivors to answer the purposes of the trust. In many of the States provision is also made

*Thus, if three persons held an estate as joint tenants, and one of them sold his interest, the purchaser would become seized of a one-third part (undivided) of the estate as a tenant in common, and the remaining tenants would remain as joint tenants. Co. Litt. 189a; Williams, Real Prop. 136.

**Greenleaf's Cruise on Real Prop. 364.

by statute, that where a power is given to several trustees, and one or more die, or are discharged, the title and authority of such trustees shall pass to and vest in the survivor or survivors.

Sec. 1507. WHAT IS MEANT BY TENANTS IN COMMON.—“Tenants in common are such as have a unity of possession but a distinct and several title to their shares. The shares in which tenants in common hold are by no means necessarily equal. Thus one tenant in common may be entitled to one-third or one-fifth, or any other proportion of the profits of the land, and the other tenant or tenants in common to the residue. So, one tenant in common may have but a life or other limited interest in his share, another may be seized in fee of his and the owners of another undivided share may be joint tenants as between themselves, whilst as to the others they are tenants in common. Between a joint tenancy and a tenancy in common, the only similarity that exists is therefore the unity of possession. A tenant in common is, as to his own undivided share, precisely in the position of the owner of an entire and separate estate.”* And, as we have seen in the last section, may compel partition of the undivided land, and thus come into full control of his interest in severalty.

*Williams, Real Prop. 137.

CHAPTER X.

WHAT PASSES WITH A GRANT OF LAND.

Sec. 1508. THE TERM "LAND" INCLUDES EVERYTHING PERMANENTLY ATTACHED TO IT.—Land, in its legal signification, includes not only the soil or ground, but also everything that is permanently attached to it, such as buildings, trees, fences, and the like.*

So the owner of a given parcel of land is regarded as owning from the center of the earth to the zenith, unless his ownership has been restricted by the express or implied conditions in the grant. For there may be several distinct interests, each owned by a separate person. There may be as many estates as there are separate and distinct interests, which can be separated and specifically described, and each owner may have a fee simple in the particular interest which he has in the property. Thus, one person may be the owner of the surface, and another the owner of the minerals below the surface. That is, the ground may be divided into estates parallel to each other, one above the other.**

*9 Conn. 374; s. c. 23 Am. Dec. 361; Coke, Inst. 408.

**143 Pa. St. 293; 152 Pa. St. 286. In the last case the question was as to the right of the surface owner to sink a shaft through a strata of coal which he had sold in order to reach gas and oil which were situated below the coal. The

Where the deed makes no reservations, but simply conveys the land, everything passes, from the center of the earth to the zenith. All minerals are included in such a grant, so that if it is desired to reserve minerals below the ground, a special exception must be made in the deed.

But while the owner of the surface has rights over the space or air above the surface, and is entitled to use it by erecting buildings thereon, and if another person desires to use it, as by stretching wires across it, he must first obtain the permission of the owner of the surface, or be answerable in damages, yet the ownership is not the same as that of the surface of the ground. If any one uses the air or space above the surface for twenty-one years, or the statutory period for obtaining prescriptive rights, adversely to the own-

court held that when a person purchases the coal upon lands, he simply purchases for the time being the space which the coal occupies; that he is not the owner in fee of that space except so long as is necessary to use it for the removing of the coal which he has purchased. What he has bought is the coal and not any part of the surface. When the coal is all out the purchaser has no longer a right to use the space for the transportation of coal from other land, since it belongs to the owner of the surface.

There may be separate and distinct freehold interests in the different apartments or floors of a building. When a room or floor in a building is conveyed, no interest in the soil is conveyed, except to have the room supported by the soil. And if there is no agreement or covenant to rebuild by the grantor, and the room or building is destroyed by the elements, the owner of the room loses his freehold estate.—110 Ind. 325; s. c. 59 Am. Rep. 209; L. R. 9 Eq. Cas. 671.

er, he obtains an indefeasible title to such use the same as he would over the surface.*

Sec. 1509. INCIDENTS THAT PASS WITH A GRANT OF MINERALS.—When the owner of lands conveys to another some particular mineral or minerals, there passes as appurtenant to the grant, the right for the purchaser or his representatives to go upon the surface and sink a shaft for the purpose of finding the minerals and removing same; and the owner of the surface and rest of the estate has the reserved right to sink a shaft through the strata or mineral granted for the purpose of reaching other minerals, as oil and gas not granted, and which lie below the one granted.**

Petroleum oil in place is a mineral, and may be conveyed separately from the soil the same as any other mineral. It is real property while in the earth. All minerals are real property while in the earth, and become personal property as soon as they are detached.***

Natural gas, so long as it remains in the soil, is considered as a mineral, but owing to its peculiar properties, it is liable to escape and pass to the land of another, in which case the original owner loses his estate therein.****

So it has been held that where one person has the right to bore for petroleum and in doing so natural gas

*7 Cush. 351; 55 N. Y. 538; 51 Cal. 258.

**18 L. R. A. 702; 152 Pa. St. 286.

***86 Pa. St. 194; 39 W. Va. 231; 130 Pa. St. 35.

****131 Ind. 277; 131 Ind. 408.

escapes through the opening thus made, he has the right to use without being liable to account for it.* But it is possible that this holding would be revised to the extent to allow the owner of the surface to recover the reasonable value of the mineral thus inadvertently secured and used.

Sec. 1510. **STANDING FOREST TREES ARE A PART OF THE REALTY.**—Forest trees while standing are a part of the realty, and are regarded as realty to the extent that a grant of them must be made in writing to satisfy the requirements of the Statute of Frauds. But while it is generally held that a parol or oral sale of standing trees passes no title, yet it is good as a license for the removal of the trees that are cut previous to a revocation of the grant or lease.**

And where lands are sold by deed and there is a parol reservation of standing trees, this reservation is within the Statute of Frauds, and invalid.*** But if the reservation was made in the deed, the title to the trees does not pass.

Sec. 1511. **NURSERY TREES AND SHRUBBERY ARE A PART OF THE REALTY.**—Nursery trees and shrubbery, although planted with the intention of removal, are regarded as part of the realty, and unless reserved, will be covered by a mortgage on the realty, and will pass to the vendee upon the sale of the realty.****

*28 W. Va. 210; 28 Am. Rep. 659.

**145 Mass. 410; 87 Mich. 107.

***71 Ind. 493; 21 O. S. 596.

****47 Ia. 479; s.c. 39 Am. Rep. 487; 31 Conn. 594; 4 Kan. 300.

Fallen trees and timber that has been cut down pass to the vendee of land by deed if there is no exception or reservation made in the deed.* But if in addition to being cut down the trees had been cut into logs, timbers, or fire wood ready for market, they then become personal property, and a sale of the land does not convey to the purchaser any title to such property, and the former owner of the land may go upon the land and remove such wood or timber. The proper form in such case, and where it is desired to retain some portion of the estate, is to use the word "excepted", as, "except the standing trees", "except the minerals", and the like, which exception keeps the property thus excepted out of the grant, or simply conveys the rest of the property.**

If the grantor desires to take something out of the granted premises, to create a new estate, the proper term to use is, "reserved". Thus, where A sells a parcel of land and desires to have a right of way over it which did not exist before, the proper term for him to use is, "reserved". The use of this word in describing the estate desired to be created anew from the grant, creates an interest appurtenant to the dominant estate; it may be an easement proper, or a profit *a prendre*, or an easement in gross, or a profit *a prendre* in gross. The reservation creates a new estate, and since it does so you should use the same terms in creating it that

*54 Me. 309; 16 Ill. 480.

**1 Pick. 23.

you would in creating a fee; that is, it should be *reserved* to the grantor, his *heirs* and assigns.*

When standing trees are excepted from a grant, and it is further provided that such timber shall be cut and removed within a specified time, this stipulation must be observed or the right will be lost.** If no time is specified in which the trees are to be cut and removed, they are to be cut and removed within a reasonable time, and if they are not so cut and taken away within a reasonable time after the owner of the land notifies the exceptor to do so, the trees will be forfeited to the owner of the land. The rule as to reasonable time is implied where the parties have set no time, and is usually a reasonable time after notice given by the owner of the land.***

Sec. 1512. RULE WHEN TREE EXTENDS OVER THE PROPERTY LINE.—When the trunk of a tree stands wholly upon the land of one person, and the branches project over the land of another and the roots of the tree extend into the soil of the other, it has been held that the fruit upon these branches

*3Wash. Real Prop. 440. As a matter of fact these terms are used indiscriminately in grants, and the courts therefore examine the language of a deed to ascertain the real meaning intended by the language used.

Profits *a prendre* differ from easements, in that the former are rights of profit, and the latter are mere rights of convenience in land without profit. Thus rights of pasture, digging sand, and the like are easements, while right to light would be a profit *a prendre*.

**90 Pa. St. 422.

***60 Mich. 620.

which project over the land of the second party belong to the owner of the land that the trunk of the tree stands on, but the other property owner may cut the branches and remove them if they constitute a nuisance.*

Where the tree stands so that the property line passes through its trunk it belongs to the adjoining owners in common. Some courts hold that the parties are absolute owners of that part of the tree which stands upon their respective lands.**

The fact that a boundary line tree, or one near a boundary line, is allowed to extend its branches over the adjoining land, is not such an adverse user of such land as will give the other owner an easement by prescription. The adjacent owner is regarded as simply tolerating a nuisance, and the mere existence of a nui-

*38 Va. 115; 22 Eng. C. L. 485. In the first case an apple tree had been planted six feet from the boundary line and the roots and limbs of the tree extended beyond the boundary line, and the branches overhung the adjoining land. The owner of the land adjoining undertook to gather the fruit, on the ground that he owned the space where the branches stood and also that the roots gathered nourishment from his soil, but the court held that the fruit belonged to the owner on whose land the trunk of the tree stood. But the adjoining owner could trim off the overhanging branches while standing upon his own land, and not be a trespasser.

**83 Iowa, 301; 25 N. Y. 123; 38 Vt. 118. In the first case a suit for damages was brought for cutting trees growing upon the boundary line. The court held that the trees were owned in common, and since they were so owned, if either party destroyed them, he was liable to the other party in damages for any injury he might sustain by the destruction of the trees. In the New York case an injunction was granted

sance for any length of time will not be allowed to create a prescriptive right.*

Since the entire tree belongs to the owner on whose land the trunk of the tree stands, the fruit of the tree belongs to him also. The owner of the trunk may gather the fruit of the whole tree from the branches if he can do so while standing upon his own premises; he is a trespasser if he goes upon his neighbor's land to gather the fruit. The fruit after it has dropped from the tree onto the ground still belongs to the owner of the tree, and he may go upon his neighbor's land and pick up such fruit, or take other steps to recover it.**

Sec. 1513. MANURE IS HELD TO BE REAL PROPERTY AT COMMON LAW.—A number of rules fixing the nature of property grew up at the common law, and which have come down to modern

restraining one party from cutting a tree so situated. The general rule being that such trees are owned in common by the adjoining owners.

*1 App. Cases 1; L. R. 3 Ch. 1; 11 Conn. 177. The adjoining owner cannot lopp off the projecting limbs unless they are a nuisance, but they are considered as a nuisance if they do the least damage to the adjoining premises.

**9 Barb. 652; 2 Shower, 28; 48 N. Y. 201. If the projecting branches are cut off they belong to the owner of the trunk, and he may recover them.

These rules are somewhat arbitrary, and are seldom necessary to be applied, as the common sense and courtesy existing between adjoining property owners is usually sufficient to make a neighborly division of the fruits of such trees possible and satisfactory to both.

times, one of these is, that manure is real property and belongs to the land. Therefore a tenant on land has no right to sell the manure as personal property, and if he does so it is regarded as committing waste. This rule was the result of an attempt to further good husbandry, and is prolific of many disputes in modern times. In some States the same rule exists as to straw; all straw stacks passing with the realty, as it is regarded as of no value except to convert into manure to enrich the soil; where it has a commercial value the rule might be different. The rule does not extend to hay, as it has a commercial value.*

SEC. 1514. ALLUVION DEPOSITS BELONG TO THE OWNER OF THE LAND ADJOINING.

—Another of the rules of the common law is that all accretions or *alluvion* deposited along the shore of a running stream by gradual and imperceptible increase, belong to the owner of the adjoining land, where it is deposited, called the riparian owner.**

SEC. 1515. AEROLITES BELONG TO THE

*56 Me. 127; 41 Ill. 466; 21 Pick. 367; 48 N. H. 87.

**“Alluvion, within the rule that soil formed by alluvion belongs to the adjoining land owner, is an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. The test as to what is gradual and imperceptible within the rule, is: that although the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference as to the ownership.” 23 Wall. 46; 28 La. 122.

OWNER OF THE LAND.—It has been held that aerolites or meteoric stones falling from the sky are added to the land on which they fall, and the title to them is in the owner of the land.*

*86 Ia. 71.

CHAPTER XI.

OF THE ANNUAL PRODUCTS OF THE LAND.

Sec. 1516. TWO CLASSES OF PRODUCTS OF THE SOIL — FRUCTUS NATURALES AND FRUCTUS INDUSTRIALES.—The products of the soil are divided into two classes, and the rules governing each are somewhat different. This division was made at a time when the cultivation of the soil had not attained the system and perfection which it has to-day, or the courts would not have made such a radical distinction.

The first class consists of those products produced naturally each year without the intervention of man, although labor or care may be necessary to bring such products to perfection; they consist of nuts, fruits, berries and grasses, and the like, and are called *fructus naturales*.

The second class consists of those crops or products which require an annual planting, as grains and vegetables, and the like, which are called *fructus industriales*, or emblements.*

The first class, *fructus naturales*, are regarded as

*49 Minn. 412. In this case it was held that hops, though seemingly belonging to the first class as they grow up naturally each year, still are classed with the second since they require poles to be set for the vines and some little attention to bring to perfection. This was also the holding at the early common law, and the courts follow it.

real property so long as they are attached to the soil, since they are products of nature arising from the soil without assistance from man; the second class, *fructus industriales*, are considered personal property. The first class of products become personal property when they are detached from the soil.

This distinction is important upon a levy of an execution, or in making a sale of such products. A constable cannot levy upon apples that are growing on the trees since they are a part of the realty, since such officers are limited to levying upon the personal property only, while he may levy upon the crops of wheat, oats, vegetables and the like. So when the products of land are sold, the first class must be purchased with the formalities required to purchase realty, while the second class are purchasable as personalty.*

Sec. 1517. RULE AS TO NATURAL FRUITS OF THE SOIL.—It is the general rule that natural fruits of the soil are an interest in land, and the sale or mortgage of such products must be in writing to satisfy the Statute of Frauds. So that if it is desired to sell a crop of apples growing upon the trees it is necessary to go through the same formalities as to sell the trees themselves.** But in England, and in some of the States, whether such products are to be deemed an interest in land or not depends upon whether or not the parties intend that they shall be immediately severed from the land. If they are not to be severed imme-

*4 Am. St. Rep. 807; 59 N. H. 201.

**1 Houston, 9; 140 N. Y. 390; 55 Vt. 285.

diately, then they are considered to constitute an interest land; if there is to be an immediate severance, they are considered as already severed, and as personal property.*

Sec. 1518. ANNUAL CROPS, OR EMBLEMENTS ARE GENERALLY REGARDED AS PERSONALTY.—In this country the general rule is that emblements or annual crops are personal property, and are not an interest in land. So that they can be levied upon as personal property; but upon the death of the owner of the land they go to the heir though they are personal property, and would be covered by a real estate mortgage.**

Growing crops produced from annual planting are also a part of the land as between the vendor and vendee of the land, unless there has been an exception in the deed. So, when a person sells his farm outright, and there are growing crops upon it, and no exception of the crops is made in the deed, the purchaser takes the land and everything growing upon it.***

Growing crops go to the devisee of land in a will and not to the executor. The crops in such a case are regarded as connected with and a part of the soil. But the will may provide that the crops shall be regarded as personal property, in which case they would go to the executor and not to the devisee of the land. But if the real estate becomes necessary to pay debts the

*L. R. 1 C. P. Div. 35; 46 Md. 212.

**49 Minn. 412.

***19 Ill. 621; 23 Ind. 56; 75 Am. Dec. 592.

administrator may sell it for that purpose, though at the early common law, the land could not be taken to pay debts, but went to the heir free from debts.*

Annual crops, *fructus industriales*, are regarded as personal property to the extent that they may be levied upon as such, and sold by parol.**

When annual crops are ready for harvest they are regarded in some of the authorities as severed from the soil;*** while others regard them as still a part of the soil as between vendor and vendee of the land.****

When such crops are sold on execution against the owner, or have been sold by the owner to another person, such sale is regarded as a severance of the crops, so that they would no longer pass with the land.*****

But a real property mortgage covers not only the land but all crops growing upon the land. Under the Massachusetts rule, the mortgagor may remove the crops before default; and under the New York rule he may remove them prior to foreclosure of the mortgage. When the mortgage is actually foreclosed, the crops growing at the time of the sale and foreclosure proceedings, belong to the purchaser, without reference to whether they were planted before or after default.*****

Crops planted by a lessee of the land belong to the

*8 East, 339; 27 Mo. 424; 63 Me. 350.

**10 Ind. 444; 96 Ala. 536; 42 N. Y. 146; 5 B. & C. 829; 81 Ill. 356; 27 W. Va. 576.

***22 Mich. 254; 29 Ind. 509; 13 Me. 377.

****58 Ia. 133; 41 Ill. 466; 52 Kan. 709.

*****38 Kan. 534; 22 Fed. Rep. 436; 90 Pa. St. 217.

*****43 Mich. 192; 79 N. Y. 568; 46 Wis. 301; 70 Cal. 296.

purchaser under a foreclosure sale. The lessee is regarded as taking subject to the mortgage, and if he plants crops he must remove them before title passes under the mortgage to the mortgagee.*

It does not matter whether the foreclosure is at law or in equity, the same rule prevails in each case. The crops, as well as all fixtures upon the land go to the purchaser under a foreclosure sale. Then where the mortgage is in possession with a right to redeem within a period fixed by statute, he can remove the growing crops until his right to redeem expires.**

While the mortgage is a mere lien, all crops severed by the mortgagor before actual foreclosure belong to him, and he may make such severance by sale of the crops.*** But this rule may change if the crops are not ready to harvest.****

*8 Wend. 584; 83 Ia. 705.

**2 N. Dak. 225; 5 Minn. 315.

***115 N. C. 70; 52 Kan. 709; 115 Cal. 7.

****35 Kan. 122; 122 Mich. 666.

CHAPTER XII.

OF RIGHTS AND INTERESTS APPURTENANT TO LAND.

Sec. 1519. APPENDANT AND APPURTENANT DISTINGUISHED.—At the early common law the distinction between rights that were *appendant* to land and rights that were *appurtenant* to it were clearly distinguished. The word *appendant* signified something that went with the land as necessary for its enjoyment. Thus, under the feudal system, when lands were given to the villeins by the lord of the manor, there were certain interests and rights which went with the land as necessary to its beneficial enjoyment, as rights of pasture, of estover, of fishery, of common, and the like, they were always *appendant* to the estate unless they were acquired afterwards by the tenant. The tenant might also acquire other special privileges afterwards, so that the parcel of ground would not only have the *appendant* privileges necessary to its enjoyment, but might have other privileges acquired after the original grant, and called *appurtenant* since they were acquired afterwards, and were not essential to the enjoyment of the estate.* But this distinction is of little significance in this country at the present time.

Sec. 1520. THE NATURE OF THINGS THAT

*Co. Litt. 121b; 122a.

MAY BE APPENDANT OR APPURTENANT TO LAND.—It is said that nothing can be properly appendant or appurtenant to anything unless the principal or superior thing is of perpetual existence or continuance. Again, the appurtenance and thing to which it is appurtenant must be of the same nature. So that if a person has a right or privilege which he is to exercise separate from the land, it is not appendant or appurtenant to the land.*

And no right can pass with land as appurtenant to it unless it is a legal right. So the appurtenance must be something which adds value to thing to which it is appurtenant, as well as be of the same nature.**

Sec. 1521. OF THE MEANING THAT WILL BE GIVEN THE WORD "APPURTENANT."—Strictly speaking the word *appurtenant* is not an apt word to describe a right not previously existing, as it has come to mean and describe rights which have always existed, or have belonged to the land, and not a newly created interest. It has been construed by the courts to mean, where necessary to carry out the true intention of the parties, "as usually occupied," or "as then occupied or used." So that if a person owns two parcels of ground, and is using one parcel

*3 Southwell, 40; 3 N. H. 190; Cro. Jac. 121.

**140 U. S. 304; 118 Mo. 61. Thus a lime-kiln on adjoining premises will not pass as appurtenant to a mill for grinding grain, though used in connection with such mill. And stock in an elevator or grain storehouse will not pass as appurtenant to a mortgage deed of railroad property.

in connection with the other, as if draining across it, or other use; and he sells one parcel and the purchaser desires to use it just as the seller has used it, the grant should specify that it is to be used and occupied as it has been used and occupied previously, which would give the purchaser the right to so use it. But the same effect will be given to the sale, if the deed conveys one parcel and its *appurtenances*, provided the surrounding circumstances show that the use of the word "appurtenant" was with the intention that the purchaser should acquire the privileges of the former owner in the other parcel of land.*

The use of the word appurtenances in a grant of land will not be construed to convey anything but legal rights, so that if the grantor had been using adjoining land unlawfully, his deed would not give the grantee a right to continue such use; and a warranty of title would not extend to such unlawful use.**

So land cannot pass as appurtenant to land, but must be included in the description in the deed.***

But sometimes in the construction of a will it will be necessary to allow a parcel of land to pass under the will not perhaps as appurtenant to land, but because the construction of the will demands it.****

*20 Q. B. Div. 225; 94 Mo. 56; 94 Neb. 56; 6 Neb. 1; 76 Me. 68; 96 N. Y. 604.

**4 Vt. 451; 29 O. S. 642.

***8 Allen, 285; 32 Vt. 384; 55 Vt. 475.

****1 P. Wms. 600.

An easement must belong to the estate, unless specially described in the conveyance, in order to pass under the grant as appurtenant.*

*97 Mass. 123; 11 Allen, 388.

CHAPTER XIII.

SOURCES OF TITLE TO LAND IN THE UNITED STATES.

Sec. 1522. LAND OWNED BY GREAT BRITAIN PASSED TO THE UNITED STATES ON THE ACKNOWLEDGEMENT OF INDEPENDENCE.—At the time the independence of the United States was acknowledged by Great Britain, she possessed all that portion of the present territory lying north of the Gulf of Mexico, and east of the Mississippi river, except a portion of Louisiana and Florida. By the express terms of the treaty acknowledging the independence of the United States, it succeeded to all the right of the British crown within these boundaries.

Sec. 1523. SUBSEQUENT PURCHASES AND ACQUISITIONS BY THE UNITED STATES.—In 1803, the United States purchased from France her holdings in North America, called Louisiana, including the present territory of Louisiana, Arkansas, Missouri, Kansas, Minnesota, Nebraska, North and South Dakota, Iowa, Montana, Idaho, Colorado, and Oklahoma and Indian Territories, this purchase consisting of about half as many square miles as the original territory of the United States.

In 1819, the government acquired from Spain the territory of Florida.

In 1845 the Republic of Texas was annexed. This

included all the territory comprised within the boundaries of New Mexico and Texas.

In 1848, the government acquired from Mexico all that territory west of the Rocky Mountains and south of the north boundary line of California, extending from the Pacific Ocean to the Rocky Mountains.

In 1867, the government purchased from Russia the territory of Alaska.

The territory included within the states of Washington and Oregon was acquired by the United States by right of discovery and settlement.

In 1896, the United States acquired by annexation the Hawaiian Islands; and as a result of the Spanish War, and purchase, it has acquired Porto Rico and the Philippine Islands.*

Sec. 1524. RIGHTS OF THE INDIANS, OR ABORIGINAL INHABITANTS TO THE LAND. —At the time of the discovery of America by Columbus in 1492, the territory of the various states was sparsely inhabited by various tribes of Indians, who were differently organized in the various portions of the country. The organization of the Six Nations in New York probably being the most complete of any, comprising six separate and distinct tribes of Indians. These Indians had communal lands adjoining their villages, very similar to the communal holdings of the early Germans in their semi-barbarous state. Aside from the communal lands the vast for-

*See maps showing the purchases in McMaster's Hist. U. S. Vol. 2.

ests were held in common as hunting grounds by the tribes, the Indians not having the idea of separate ownership of land except where their wigwams were situated. By reason of this prior possession the Indians claimed to have the sovereign title to the land by the laws of nature.

But when the European nations began to discover and make settlements in the new world they paid little attention to the claims of the Indians, and assumed that the soil belonged to the sovereign of the country in whose name it was discovered, and that the tribes occupying it had no sovereign title, but a mere right to use it, which was similar, if not identical to the feudal doctrine that title belonged to the sovereign, and the inhabitants entitled to the use only of the land.

The question of the Indian's claim to sovereign title to land came before our supreme court and was decided by Chief Justice Marshall in accordance with the prevailing rule among European nations, as follows:

1. That the title to land depends upon the laws of the country in which the land is situated.

2. The several European nations claiming possession upon this continent agreed that the nation whose subjects first discovered any portion of this continent should have title to that portion of the land.

3. The relations to exist between the discoverers and the aboriginal inhabitants were to be regulated by themselves.

4. The aboriginal inhabitants were admitted to have the right of possession of the soil, coupled with the right to use it; but the right to alienate it was incompatible with the title of the discoverer.

5. The possession and right to use in the original inhabitants did not prevent the nations who held the ultimate title by right of discovery from granting the lands, and the grantee took a good title subject to the Indians' right to use it.

6. The United States upon gaining independence succeeded to all the rights of Great Britain, France and Spain within the limits of the territory acquired.

7. The United States has the exclusive right to acquire the title of the Indians. In other words, no grants made by the Indians to a private individual were good. The Indians could not sell their right to occupy and use the land to a private individual.*

Sec. 1525. RELATIONS OF THE UNITED STATES GOVERNMENT WITH THE INDIAN TRIBES.—The relations of the general government with the various Indian tribes has been somewhat anomalous. While the Indian is regarded as having no paramount title to the land, yet the tribes are considered so far independent as to enable them to make treaties ceding their lands to the general government,

*Johnson v. McIntosh, 8 Wheat. 545, in which case a Choctaw Indian claimed land under the grants of certain Indian Chiefs who were the original occupants of the territory, and the court held as above stated that the Indians could not convey a good title to a private individual as the Sovereignty was in the United States Government.

and that is about all the independence our government has recognized as belonging to the Indian tribes.

These treaties are made by persons appointed by the President with the consent and advice of the Senate, and are called Indian Agents. The government has thus made treaties with the Indians for all of the North West Territory. In many instances the Indians have reserved a reservation and ceded the balance of the soil. These reservations in many cases were in favor of the entire tribe, but in some cases were in favor of an individual. These reservations are described by their natural boundaries, as water courses, trees, rocks and the like. In surveying the government land the surveyors regard these reservations as impassible territory, and run the line up to them and then around. It is these territories that the government buys from the Indians from time to time and opens up to settlement.

In tracing title to land in an Indian Reservation, the completed title starts with the treaty made with the general government by the Indians, as the sanction of the two as to the land in the reservation makes a perfect title.

Sec. 1526. OF TITLE BY RIGHT OF DISCOVERY AND POSSESSION.—In 1496, the King of England granted a commission under the royal seal to John Cabot, a Venitian sailor, then residing in England, to discover countries then unknown to Christian people and take possession of them in the name of the crown of England.

Possession was then deemed necessary to a perfect title. So that these early explorers would land on the coast, throw out to the breeze the flag of their sovereign and formally announce that they took possession of the territory for their sovereign.

Two years after receiving his commission, Cabot landed at the 56th degree of north latitude and sailed south along the coast to the 38th degree, formally taking possession of the country lying north of the Gulf of Mexico and running from the Atlantic to the Pacific in the name of the king of England. But it turned out that the French and Spanish monarchs had prior claims to part of the territory, and some of the lands claimed by England by right of Cabot's discovery and taking possession had to be relinquished to prior discoverers. It was a recognized rule that the discovery of the mouth of a river, entitled the discoverer to all the territory drained by that river, so that the entire Mississippi river basin was given up by England by reason of previous discovery.

Sec. 1527. TITLE TO LAND UNDER COLONIAL CHARTERS.—The charters of the colonies differed materially from each other, and land tenures differed correspondingly. Some possessed charter governments, others provincial and others proprietary, as Pennsylvania and Maryland. Yet the colonists claimed, as a rule: 1. That they enjoyed the rights and privileges of British born subjects, and that the common law of England was in force in each colony. 2. In all the colonies the land within their limits was

held under the original grants and charters in free and common socage, and not under copyhold or knight service tenures.* They all agreed that the feudal system did not exist in this country, and that the land was held free from all manner of feudal service.

No oath of fealty seems to have been required in this country, but the oath of allegiance has been required in many states because the laws prohibited a foreigner from holding lands. This oath of allegiance takes the place of the feudal oath of fealty. No other services have ever been required, and free socage is an independent holding, if not an absolute holding.**

In this country no ceremony has ever been required or used in the conveyance of land except the livery of seizin.

Sec. 1528. **CESSION OF LANDS BY THE COLONIES TO THE GENERAL GOVERNMENT.**—At the close of the war for independence, the colonies were burdened with a heavy debt, and it was suggested by the several states that the land belonging to them outside the limits of their several jurisdictions should be turned over to the general

*Title in common socage differed from the other feudal tenures in that it was free from many of the feudal burdens and services, the principal burden attaching to it being the oath of fealty to the lord paramount.

**Story, Const. Law, Ch. 17. For all practical purposes our lands are held absolutely, but in theory they are held in free socage. This is shown by the escheat to the State on the failure of heirs; and in the right of the government to take lands for public purposes upon giving compensation by the right of eminent domain. 6 How. 532.

government for the purpose of paying their share of the public debt, and for the further purpose of having the territory divided up into states to be later admitted into the Union. At this time all the land east of the Mississippi was claimed by one or the other of the original states. Virginia claimed all the North West Territory, but her title was disputed by Connecticut and Massachusetts. These conflicting claims were all settled and the land ceded to the United States Government, except a portion of what is now the northern part of Ohio, given to Connecticut in satisfaction of her claim. This reservation was settled by people from Connecticut under grants from that state, and is still known as the Connecticut Western Reserve.

When the general government acquired this land from the states, it at first sold and transferred large tracts to private individuals and corporations, but soon afterwards it adopted the public land system, which has since been in force.

Sec. 1529. SURVEY OF THE PUBLIC LANDS. —When the public land system was adopted by Congress it was directed that two lines be run through the particular territory to be surveyed, one called the *base* line and the other the *meridian* line. The base line running from east to west, and the meridian line from north to south and intersecting the base line at right angles.

After the base and meridian lines are run, the townships are surveyed beginning at the intersection of the base and meridian lines. The townships are

six miles square, and each township is subdivided into thirty-six sections of six hundred and forty acres each. The townships are numbered with reference to the base line and meridian line. The first township that touches the base line on the north and the meridian on the west would be township one north, range one west. Townships are numbered from the base line north and south, and from the meridian line east and west. So that if the number of the township is given and you know the location of the base line, the location of the township may easily be found.

After the territory has been surveyed into townships six miles square, each township is subdivided into sections containing six hundred and forty acres; these sections are numbered consecutively from one to thirty-six, commencing in the north east corner of the township and numbering back and forth so that number seven falls under number six, and number twelve under number one, and so on, number thirty-six falling in the south east corner of the township.

The sections are again divided into equal parts by running lines through the center north and south and east and west. A stone or other monument being placed in the center of the section and at each of the corners and at each end of the quarter lines. The outside lines are called section lines, and the cross lines are designated quarter-section lines. These are the only lines actually run by the surveyors, though the quarter sections may be again divided.

When a plat of the survey is made in the Surveyor

General's office, each quarter section is again divided into four equal parts by drawing lines through the center north and south and east and west. The quarter sections, containing one hundred and sixty acres each, are designated the northeast quarter, the southeast quarter, the northwest quarter and the southwest quarter of each particular section, and the division of the quarter sections are likewise designated as such parts of the quarter section. So that the full description of a forty-acre strip might be, for example, "The Northeast Quarter of the Northeast Quarter of Section 1, Township 5 North, Range 1 East of the Third Principal Meridian."*

*When the survey of the public lands was made, if the land was open prairie the sections would, of course, be full ones. If the lines run into a lake, the township lines would be run up to the lake and then meandered along the shore. As a result of this there would be fractional portions of sections on both sides of the lake. These fractional sections are surveyed and sold as so many acres of hard land, and no part of the water is included. A rule of the General Land Office requires that in case any quarter section contains less than 160 acres it shall be sold as an entire parcel. If it contains more than 160 acres it shall be subdivided into parcels, and so offered for sale. When a quarter is less than 160 acres a portion of another quarter may be included in the survey. Thus if a meandered lake divides a section so that a portion of the S. W. quarter is less than 160 acres, the survey may include a portion of the S. E. quarter.

If a stream is not meandered the bed is treated as so much hard land and does not affect the survey. 70 Mich. 552; 57 Mich. 241; 3 How. 650; 20 How. 372.

When land is sold by the government the land being designated as the "west half" or the "north half" of a section or quarter section, then the parcel west or north of the center

Sec. 1530. SAME SUBJECT—RIGHTS OF RIPARIAN OWNERS.—When the government sells land bordering on a river, or fresh water stream, the several riparian owners have a right to use the water in common for all ordinary purposes. If it is a lake or stream of considerable size and irregular shape the right to use any particular portion of

line is conveyed without reference to whether it contains one-half the land in the section or not. It may contain two-thirds of the land in the section or less than one-third, the grantee takes all the land on the designated side of the center line as run by the surveyors, be the same more or less.

But if the deed is between private persons and describes the land as the north or south half without reference to the Government survey, the line dividing the parcel into equal parts would be the boundary line. 70 Mich. 552; 57 Mich. 241; 3 How. 650; 20 How. 372; 127 Mich. 41.

In running lines north and south the lines approach each other towards the north on account of the earth being round. Hence in measuring a township six miles on the south boundary and running directly north the northern boundary will be shorter. The result is that the sections in a township cannot be exactly a mile square, and do not all contain 640 acres. The question then arises as to where these fractional sections fall. In correcting the errors thus caused number 36 is made a full section, and all others are until the west boundary line of the township is reached; and the sections on the west boundary are larger or smaller in their dimensions to make up the difference. In like manner all the difference in the north and south dimensions is corrected in the northern line of the sections. So that almost every section on the west and north of the townships in a government survey is fractional section, and the fraction is made to fall on the north or west side of the subdivision. That is, the surveyor commences on the southeast corner and makes the shortage or surplus to fall on the north or west tier of sections, so that all sections are full except on the north and west sides of the township.

the water for a special purpose, as cutting ice, will have to be fixed and determined by a partition suit in equity. In ordinary cases where the lake or stream is small, each riparian owner has the right to cut ice on that portion of the water bounded by the center line of the water and a line drawn from the point where the boundary line of his land touches the water at right angles with the center line, or within the section lines projected into the lake.*

Sec. 1531. SALE OF PUBLIC LANDS.—The public lands are divided into land districts and in each of these a public land office is established. The officers of the land office are a Register and Receiver. The lands must first be offered at public sale, and sold to the highest bidder, provided the bid is equal to the

*62 Mich. 614; 102 Mich. 227; 140 U. S. 191; 118 Mich. 125; 134 N. Y. 305; 18 L. R. A. 695.

This general survey of the government lands was not adopted by a number of States, the lands simply being sold as so many acres in the unsurveyed portion of the government territory, and then a surveyor was allowed to go and locate that number of acres; as a result the various lines frequently overlapped one another and created many disputes as to boundaries. 15 S. W. Rep. 727.

The land department of the government was first established in 1812. At first it was under the supervision of the Treasury Department, but was later transferred to the Department of the Interior, where it has since remained. The head of the department is called the Commissioner of the General Land Office, who acts under the direction of the Secretary of the Interior. The government lands are divided into convenient land districts, in each of which a government land office is established, which are consolidated as the public lands are disposed of.

minimum price fixed by the government. The original price was \$1.25 per acre, except where land bordering on railroads was offered for sale. On the purchase of one of these parcels of land the price is paid to the Receiver of the local land office who issues a certificate of purchase. This certificate entitles the purchaser to a deed or patent to the land from the government, but it is first sent on to the general office at Washington, where the records are examined to ascertain if any mistake has been made. If no errors are detected a deed or patent is issued signed by the President and the Register of the Land Office, and is recorded at Washington and is then sent to the local land office to be there placed on file. This deed from the Government is called a *patent*, this being the term used by the English government for grants of land made by the crown to private individuals.

The title to the land purchased does not vest in the purchaser until the patent has been recorded. In this a patent differs from a deed, as delivery is essential to passing title by deed, but recording of the patent is sufficient to pass title by patent.*

Sec. 1532. SAME SUBJECT—GOVERNMENTAL GRANTS FOR EDUCATIONAL PURPOSES.—The United States Government has made various grants to the various states of public lands for educational and other purposes. Thus, in the North West Territory the sixteenth section in every

*102 U. S. 378.

township was given for educational purposes. Grants have likewise been made for the benefit of Universities and Colleges. And sometimes the states have been given large tracts of swamp land in order to have them drained and made usable.

So, in the various purchases made by the United States, as Florida from Spain, Louisiana from France, and the recent acquisition of Porto Rico and the Philippine Islands, the treaties made, provided that the rights of the private owners of the property in the territory acquired should be respected and confirmed by the United States.

CHAPTER XIV.

COVENANTS OF TITLE.

Sec. 1533. MEANING OF COVENANTS.—

Covenants, or covenants of title have nothing to do with title so far as the conveying or withholding of title is concerned. Though it is a matter of common belief that a *warranty deed* with full covenants of title conveys a better title than a quit claim deed. As a matter of fact, in either case the grantor simply conveys the title which he has, and if he has no title it makes no difference whether he warrants it or not, none passes by the conveyance. So that covenants in a deed have nothing to do with the effect of the deed upon the title immediately. They may indirectly, because if a warranty deed is given and the grantor afterwards acquires a good title, the warranty deed estops him from claiming any title under the new title he has acquired. But the real value of covenants of title, as contained in a warranty deed is that the grantee may have a right of action against the grantor if the title fails.

The usual covenants in a deed are: 1. Covenant of seizin. 2. Covenant of the right to convey. 3. Covenant against incumbrance. 4. Covenant of quiet enjoyment. 5. Covenant of further assurance. 6. Covenant of warranty. This covenant of *warranty* is simply one of the covenants, and a warranty deed

may be confined to this one covenant, or it may contain all the other covenants.

Sec. 1534. TITLE DEFINED AND EXPLAINED.—Title is defined to be the means whereby the owner of lands comes into the just possession of his property. A perfect title requires the union of possession and the right to the thing possessed. At the common law the lands could not be conveyed unless the grantor was in possession and could give livery of seizin. It was against public policy to covenant to convey or sell lands when you could not put the purchaser in possession, since it was supposed to stir up litigation and cause a multiplicity of suits. The primary meaning of seizin is possession and the right of possession; its secondary meaning is that of possession alone.

Sec. 1535. THE COVENANT OF SEIZIN.—In a number of the states it is held that the covenant of seizin means possession only, and it is therefore not broken if the grantor is in possession and delivers such possession to the grantee.* So that, under this rule, if the grantor is in possession wrongfully at the time of the making of the deed, there would be no breach of the covenant. But in these states if there is anything in the covenant indicating that the vendor is in possession of a particular title, as an indefeasible

*4 Mass. 408; 69 Me. 510; 3 Ohio, 510; 27 Ill. 229; 4 Neb. 135.

fee simple, then there is a breach of the covenant if he does not hold under that particular title.*

But in most of the states the courts repudiate the Massachusetts rule, and hold that possession alone is not sufficient to satisfy this covenant of seizin, and that it means a covenant of title as well as possession. That is, most of the states hold that a covenant of seizin imports that the grantor is not only in possession, but has the right of possession.** In such states the covenant of seizin is defined to be an assurance to the purchaser that the grantor has the very estate in quality and quantity which he purports to convey, following the English rule.*** So that under this rule the covenant is broken if the grantor has merely an estate tail, or there is an outstanding estate for life or for years.****

But the covenant of seizin is not broken by the existence of an easement which does not affect the seizin of the grantor, such as a public highway or execution lien.***** The covenant is broken, if at all, as soon as the deed is given, and the statute of limitation

*11 Cush. 134.

**6 Conn. 373; 3 Vt. 403.

***11 East, 633.

****38 Vt. 469; 23 Conn. 349; Rawle, Cov. of Title, Sec. 59.

*****16 Ind. 338. When the covenant is as to wild lands they are construed to be in the possession of the person holding the government title. So that if the holder of such title covenants that he is well seized of the lands, it is sufficient if the lands are not in the possession of another, and he has constructive possession. 38 Mich. 373; 5 Hill, 599; 57 Mich. 219.

governing the right of action for the breach of the covenant begins to run immediately. And the suit for the breach must be brought within the time fixed by the statute of limitation or the grantee cannot recover.

When a breach of this covenant occurs and an action is brought, the plaintiff is not required by the course of the common law to aver eviction in his declaration, or to allege any special damages, nor is he required to set up any particulars of the paramount title. All that the plaintiff need do is to negative the title of the defendant. The defendant must plead affirmatively that he had a good title and support such plea by proof. If no proof is introduced the plaintiff is entitled to recover. The reason being, that at common law there was no registration of title deeds, and the evidence of title were the deeds that were given from the grantor to grantee, and the grantor was supposed to have in his possession at the time of granting the land all the evidence of title. The grantee, therefore, if in doubt as to his title can bring suit and compel the grantor to show that the title granted is the very title granted in the deed. The burden being upon the grantor, or defendant, to prove affirmatively that the deed he gave was a good and sufficient deed covering the very title which it purported to convey.*

But this rule of the common law has been changed by statute, so that generally it is necessary in draw-

*14 Johns. 248; 36 Ia. 158; 34 Me. 375.

ing a pleading for breach of the covenant of seizin to set forth affirmatively in what manner the covenant has been broken.

Sec. 1536. THE COVENANT OF THE RIGHT TO CONVEY.—The covenant of seizin in those states that follow the rule that it is a covenant of title and not merely of possession, is equivalent to or synonymous with the covenant of right to convey. But where seizin means possession merely, and the party covenants that he has a right to convey, it is interpreted that in addition to being in possession he has the title.*

The covenant of right to convey is broken, if at all, as soon as made, and is governed by the same rules in regard to pleadings and damages as the covenant of seizin.**

Sec. 1537. THE COVENANT AGAINST INCUMBRANCES.—A covenant against incumbrances is regarded in this country as an independent covenant, and is usually worded as follows: "And that the premises are free and clear of all incumbrances whatsoever." When this covenant stands alone it is broken as soon as made, if there exists any incumbrance on the land.

It is sometimes coupled with the covenant for quiet enjoyment, and as the covenant for quiet enjoyment is a covenant in futuro, when the two are thus

*5 Best & Smith, 325; 6 Best & Smith, 766.

**5 Foster, 234.

coupled, it makes of the covenant against incumbrances a contract in futuro.* The time of the breaking of the covenant is important on account of the statute of limitation beginning to run from that time. So that if the covenant against incumbrances stands alone, it is broken when the deed is made and the statute begins to run immediately, which is not the case if it is coupled with the covenant of quiet enjoyment, in which case the covenant is not broken until the quiet enjoyment is disturbed, that is, until an action is brought by someone to oust the party.

Sec. 1538. SAME SUBJECT—MEANING OF AN INCUMBRANCE.—An incumbrance within the meaning of the covenant against incumbrances, has been defined to be any right to, or interest in the land, that may subsist in any third person to the diminution of the value of the land, but consistent with the passing of the fee. This covers not only mortgages, execution levies and liens upon the land, but also everything in the way of easements, and the like. The covenant in effect means that the title is not affected by any interest which any third person possesses which may interfere with the possession and enjoyment of the premises.**

As a general rule any lien or right held by a third person which affects the title or use and enjoyment of the premises is an incumbrance within the meaning of

*Rawle, Cov. of Title, Sec. 7174.

**42 Mich. 90; 2 Greenleaf, Ev. 242.

the covenant. Thus a tax lien, or a restraint upon building is held to be an incumbrance.*

Certain incumbrances, as a public highway, and the like, are excluded from being a breach of the covenant on the ground that they were not intended to be included within the covenant by either party at the time of executing the deed.**

Sec. 1539. SAME SUBJECT—EFFECT OF BREACH OF COVENANT AGAINST INCUMBRANCES.—A covenant against incumbrances standing alone is broken as soon as the deed is given, if at all, but since it is treated as a covenant of *indemnity* by the courts, the grantee could only recover actual damages. That is, the covenant obligates the covenantor that he will make the title good, and he must reimburse the grantee for what he has been compelled to pay out to satisfy the incumbrance. If the grantee brought suit before satisfying the incumbrance he could only recover nominal damages, since he had suffered no actual damages as yet.*** And as only one action could be brought for the breach of the covenant, the recovery of nominal damages would be a bar to another suit after having discharged the incumbrance.****

Where the incumbrance is an easement the cove-

*133 Mass. 12; 48 N. H. 475; 4 Biss. 409.

**15 Johns. 483; 118 Mass. 456; 32 Vt. 728; 34 Md. 1; 50 Wis. 620.

***30 Wis. 341.

****36 Me. 455; 87 Mo. 660.

nantee will be entitled to recover such damages as are the proximate consequences of such easement, but he will not be entitled to recover special damages arising because of some particular use which he might make of the land. The rule of recover is not actual damages, but rather the difference between what the property would be worth on the market without the easement, and what it is worth with the easement as it exists.*

If the incumbrance be an unexpired term of years, the extent of that term or the interest upon the purchase money for the term is the measure of damages. So if the rent which the tenant on the land is to pay amounts to the interest on the purchase price, the covenantee is entitled to the rentals and could recover no damage.**

Where property is sold subject to incumbrances, such incumbrances should always be excepted from the operation of the covenant.***

Sec. 1540. THE COVENANT FOR QUIET ENJOYMENT.—This is a covenant or assurance against disturbances consequent from a defective title. And is

*39 Ia. 236; 2 Allen, 438.

**7 H. L. 538; 11 Ohio, 120; 68 Pa. St. 400; 39 Calif. 360; 43 Conn. 129; 22 Wis. 503; 19 Mo. 430. In Michigan a covenant against incumbrances is broken immediately if there is an incumbrance against the land which can be then discharged, but if the incumbrance cannot be immediately discharged, the statute of limitations does not begin to run until the incumbrance can be discharged. 52 Mich. 587; 40 Mich. 42.

***10 Conn. 423; 21 Mich. 382.

a covenant usually found in short leases.* When this covenant is broken by the eviction of the grantee at the instance of the holder of the paramount title, the grantee is entitled to recover, in a number of states, the value of the premises at the time of the eviction.** But the overwhelming weight of authority in other states is that the rule of damages for the breach of this covenant is the same as that for the breach of the covenant of seizin, and that is, the purchase price of the land, and not their value at the time of being deprived of them.***

In case of a breach of the covenant for quiet enjoyment in a lease, it was first held that the measure of damages was the amount of the rent paid.**** But this rule has been so far modified by the weight of authority that the tenant is permitted to show the value of the premises at the time of the breach, and can recover actual damages.*****

Sec. 1541. THE COVENANT FOR FURTHER ASSURANCE.—The word assurance is the old term for deed, and means the same as the deed or instrument by which the title or additional claim of title is transferred. The grantee is assured by this covenant that the grantor will execute any additional deed which may be necessary to

*11 East. 634; 74 Pa. St. 429.

**14 Conn. 214; 12 Vt. 387; 27 Me. 529.

***41 N. H. 373; 27 Pa. St. 288; 43 Ark. 229; 23 Mo. 166; 18 Nev. 365; 1 Mont. 388; 6 Wheat. 188.

****14 Wend. 38; 11 O. St. 120.

*****42 N. Y. 167; 29 How. Pr. 20.

make the title perfect. So that if in the future the grantor obtains a better title than he had at the time of conveying, the grantee may go to him and secure a further quit claim deed, and make him pay the costs of any proceeding necessary to secure such further deed.*

An action at law cannot be maintained for a breach of this covenant until the covenantor has been requested to make such further assurance. But only such acts may be required of the covenantor under this covenant as are *necessary, practicable, and lawful*.** The great advantage of this covenant is that it gives the grantee the power to enforce specific performance of the transfer of title, where the grantor has subsequently come into possession of a further and better title.***

Sec. 1542. THE COVENANT OF WARRANTY. —The covenant of warranty is the most important in a deed in this country. This sweeping covenant of general warranty includes nearly all the other covenants. It dates back to feudal times, and was the covenant which enabled the tenant in tail to bar the entail by a common recovery.

This covenant as usually worded is, that the grantor warrants and defends the granted premises against all claims of all persons whatsoever. It is more than a covenant for quiet enjoyment, being a covenant to

*54 Md. 227.

**L. R. 10 Ch. App. 31.

***3 Va. 342.

defend both the possession and the estate granted in the land, giving the grantee a right to call upon the grantor to make such defense as should be made in case an adverse title is set up.*

This being the only covenant of title in which the grantee can call upon the grantor to defend the title.** Upon due notice given to the grantor, when a general covenant of warranty exists, he is obliged to come in and defend the title, or judgment may be taken against him. This notice must be definite and unequivocal, and expressly require the covenantor to appear and defend.*** And by statute in some of the states the notice is required to be given in writing.****

The judgment given where the covenantor has been properly notified to appear and defend is con-

*40 Vt. 310.

**24 Wis. 23; 124 Mass. 373; 108 Ind. 271; 48 Ill. 271. Thus if there is a general covenant of warranty and a covenant against incumbrances, and a third person who holds a mortgage upon the land brings a foreclosure suit against the vendee of the land. If the covenant only consisted of the one against incumbrances, the grantee could not compel the grantor to come in and defend the foreclosure suit. And if the suit went against the grantee he would have to pay the mortgage and then bring an action on the covenant against incumbrance to recover the amount paid out. But where the general covenant of warranty exists, the grantee upon giving notice to the grantor may compel him to come in and defend the suit, and if the adverse claimant prevails and gets judgment, that judgment is conclusive against the vendor so that the grantee may have judgment against him for the value of the premises.

***3 Sarg. & Rawle, 410; 6 Mo. App. 588; 24 Wis. 17.

****38 Mich. 132; 16 Wend. 427.

clusive upon him since he thereby becomes either actually or constructively a party to the suit. The general rule is that the judgment of a court does not bind parties who are not parties to the action; notice to the covenantor must be given to bring him out of this rule. So that if he is not properly notified the judgment is not binding upon him.*

But where the covenantor is not notified, and judgment is taken against the grantee in favor of an adverse claimant, the grantee may then bring suit upon the covenant of warranty, and by showing that the title was defective recover judgment against the grantor for breach of warranty. The only difference being that two suits must be gone through with in this case.**

Sec. 1543. SAME SUBJECT—GENERAL AND SPECIAL WARRANTIES.—The covenant of warranty may be *general*, as against the whole world; or *special*, against particular persons. The covenant of warranty may be limited to the acts of the grantor himself, or otherwise limited.

Where the warranty is general the adverse claim must be valid and not a fictitious claim. The covenant is not that no adverse claim shall arise, but that the title is good, though he is obliged to defend against fictitious claims.***

As a rule the covenantor is not obliged to defend

*11 Allen, 370; 3 S. & R. 410.

**5 Ohio, 158; 51 Ill. 373; 3 Term Rep. 374.

***102 Ind. 443; 61 Wis. 101; 133 Mass. 59.

against a fictitious title unless: 1. The tortious act is done by the covenantor himself or at his instigation. 2. Or where the covenant is against the acts of some third person specifically. 3. Or the covenant is against all persons claiming or pretending to claim title.*

The covenant of warranty does not extend to the right of eminent domain. The sovereign power has always this right, and it is not a breach of any warranty for lands to be taken by this right.** Nor does warranty extend to cover any other lawful act of the general public.***

Sec. 1544. SAME SUBJECT—WHAT CONSTITUTES A BREACH OF COVENANT OF WARRANTY.—At common law eviction was necessary to a breach of covenant for quiet enjoyment. An eviction at the present time means something of a grave and permanent nature, something more than a trespass. So that it is not necessary at the present time that the vendee should be dispossessed by the holder of the paramount title. If such an adverse claim is set up he may surrender possession or purchase the adverse interest and bring suit against the grantor for breach of covenant. But there must be at least a claim of

*3 Cush. 325.

**57 Ill. 509; 12 Wall. 457; 102 Mass. 19.

***38 Mo. 305; 4 Douglass, 354. The Missouri case growing out of the emancipation proclamation which freed the slaves, the claim being that it was a breach of warranty, where a slave had been sold as a slave for life. It was held that a warranty did not extend to cover any lawful exercise of sovereignty.

right of possession by the adverse holder, who must demand possession and threaten eviction. Then, if he has a good title the vendee may surrender possession and look to his warranty. But unless the grantee notify the warrantor he may have the burden of showing that such adverse claim is genuine.*

In every case the holder of the adverse title must assert it in a hostile manner, so that the possession is actually put in jeopardy by the hostile movement of the adverse claimant.

There may be a constructive eviction, as where the land granted is held by a third person, claiming adversely. In such a case the covenantee may maintain his action on the warranty immediately, since he is out of possession and cannot regain it without suit.** But if the lands are wild lands, which are presumed to be in the possession of the person who holds a valid title to them, yet if some third person claims such title to the lands it is not sufficient to constitute a breach of the warranty before eviction is attempted.***

The adverse claim of a third person by reason of which the grantee cannot obtain possession must be under a claim of title, and not merely adversely, as simply because he is in possession.****

*4 Mass. 350; 83 Ind. 546; 32 Ia. 76; 3 Dana (Ky.), 164; 17 Ill. 190.

**31 Minn. 368; 48 Mo. 250; 45 N. Y. 499.

***38 Mich. 373; 54 Miss. 450; 11 N. H. 74; 5 Hill, 599.

****3 Ill. 183.

Sec. 1545. SAME SUBJECT—WHOM THE COVENANT BENEFITS.—The question arises as to who may take advantage of the covenants of title. The first grantee may, of course, take advantage of them. When he sells the land, what is the effect of the previous covenant? If the covenant is purely personal it does not run with the land, or follow the land to successive purchasers, and therefore cannot be enforced by subsequent purchasers.

Covenants are said to *run with the land* when the purpose is to give future protection to the title conveyed; and not to run with the land, when their whole force is spent in giving assurance against something which immediately affects the title and causes the person damage; that is, present damage.*

Where the covenant runs with the land, the owner for the time being is entitled to the benefits of such warranty. The covenant passing along with the land for the benefit of any subsequent purchaser.

Covenants for quiet enjoyment, warranty, and for further assurance run with the land. While covenants of seizin, right to convey, and against incumbrances do not run with the land.

Aside from the right of action for breach of covenant, the grantee has vested in him any after acquired interest of the grantor by reason of the doctrine of *estoppel*. The grantor is estopped from setting up a superior title if he has not done so when it was his

*42 Mich. 90.

duty to do so, and his subsequent claim would be a breach of duty, so he is held bound by the title which he has previously affirmed.*

*68 N. C. 35; 15 Minn. 58; 20 Me. 262. If the grantor can buy up an outstanding claim, the doctrine of estoppel passes the title to the grantee so as to defeat an action for breach of covenant.

CHAPTER XV.

RECORDING OF DEEDS AND MORTGAGES.

Sec. 1546. RECORDING LAWS PURELY STATUTORY.—In all of the states there are statutory provisions for the recording of deeds and mortgages and all other proceedings and instruments affecting the title to real estate. These statutes are purely local, but are substantially uniform in the various states.

The object of these laws is to give the public notice of the condition of the title to lands, and the statutes which provide for recording declare that the recording shall be notice to everyone of all facts therein contained, and also that any deed or mortgage or other instrument affecting title to land, which has not been recorded as required by these statutes, shall be void as to a subsequent purchaser or incumbrancer in good faith and for a valuable consideration. In most of the states actual notice of the existence of a deed or mortgage is just as good as the constructive notice which arise from the proper recording of the instrument.*

Sec. 1547. RECORDS WHERE KEPT AND HOW ENTERED.—These records affecting title to lands are usually required to be kept at the county

*Rev. Stat. Ohio, Sec. 4143; 35 O. S. 414.

seat of the various counties in the state, and separate books are kept for deeds, mortgages and other instruments, as leases, execution levies, land contracts, and the like. The statutes also provide that separate books be kept for the entry of deeds and mortgages for record before they are actually recorded, and they are effective from the moment of such entry for record. The entry book being a mere memorandum of the names of the parties, grantee and grantor, and that the instrument has been left for record, it is later copied at length in the regular record book of deeds or mortgages. The entry books show the day, hour and minute at which the instrument was left for record, the names of the grantor and grantee, the town, city or village, where the lands conveyed are situated, as well as a sufficient description of the lands as to enable any one to locate them. The deed or mortgage is then regarded as recorded, giving public notice to all of its contents, from the moment of this entry for record, or of its being left for record with the Register or Recorder for entry.*

It is held that the entry in the preliminary register book of the names of the grantor and grantee and other facts necessary to be therein stated, will cure an omission of these facts when the deed or mortgage is recorded at length, as the abstractor is presumed to look at the entry book when the names are omitted in the record.**

*Rev. Stat. Ohio, 4133.

**44 Mich. 125; 14 Mich. 361. The register is obliged to

Sec. 1548. EFFECT OF MISTAKE IN RECORD.—A subsequent purchaser of land has the right to rely upon the records as showing the exact facts, unless he has received actual notice that the record is incorrect. In some states the person or persons procuring an instrument to be recorded are held responsible for all errors in the record, on the principle that the recording officer acts as an agent of such person or persons.* But this rule does not prevail in other states, where it is held that the Register or Recorder is a public officer and not the agent of any individual having an instrument recorded.**

The purchaser is not charged with the contents of the deed or mortgage further than such contents are contained in the record. Thus it has been held that when a mortgage was recorded for less than its actual value, it was only notice to the amount stated in the record.*** And where the record omitted the name of one of the subscribing witnesses, the record was held to be no notice at all, because without the witnesses required by the statute the instrument was not en-

simply record what is on the face of the instrument, nothing else, so that where there is no seal to the instrument and the statute requires one, the instrument is not entitled to record, and a memorandum that there was no seal on the recording of the instrument would not aid the instrument. The record implies a seal as the instrument is not entitled to record where it is absent. It should be indicated in the record with a scroll. 128 Mich. 162.

*29 Mich. 162.

**19 Ill. 486; 35 Ala. 23; 1 A. K. Marshall (Ky.), 306.

***1 Johns. 288.

titled to record, and if not entitled to record the defective record was not a sufficient notice.*

In some states a different rule prevails and it is held that when a valid instrument is left for record, and the person leaving the instrument has complied with all the requirements of the statute, and by reason of an error of the recording officer the instrument as recorded is defective, the error thus made will not be chargeable to the person having the instrument recorded, and he is entitled to have the instrument give notice as it actually is and not according to the defective record.**

Where the statute prescribed what formalities are necessary to the execution of a deed, as two witnesses, under seal and the like, a failure to observe these requirements make the instrument incapable of being recorded, and though recorded in fact it gives no notice to the public. The reason is that the provision for this constructive notice is purely statutory, and unless the requirements are observed the instrument not being entitled to record can give no notice.

The object of recording laws is to give the public notice of the title to land within the jurisdiction covered by the recording office. But it is not made exclusive notice so that actual notice may not be shown. A purchaser having no other notice than that of the record is entitled to rely upon it, if the instrument was entitled to record, as the statutes declare that every

*5 Minn. 323; 13 Mich. 367; 6 McLean, 15; 14 Mich. 361.

**19 Ill. 486; 35 Ala. 23; 1 Marshal (Ky.), 126.

conveyance of real estate hereafter made which shall not be recorded shall be considered void or fraudulent against any subsequent purchaser in good faith and for a valuable consideration whose conveyance shall be first recorded.*

Sec. 1549. PROOF OF TITLE FROM RECORDS.—Title to land may be proven from the records in two ways: 1. The records themselves may be brought into court and introduced in evidence, which is the usual way where the records are of easy access. 2. By a certified copy of the records, which may be introduced with the same effect as the originals. But if any of the records are of instruments which are not so executed as to be entitled to record, they cannot be admitted and have no effect, so that the chain of title would fail, as where the instrument has no seal, and one is required by the statutes.

Sec. 1550. SUBSEQUENT PURCHASERS' RIGHTS.—The recording laws being for the protection of subsequent purchasers, by providing a method by which any one may ascertain the true state of the title to any parcel of land, it is always held, that the holder of a prior unrecorded deed is defeated by the holder of a later deed procured in good faith and caused to be recorded before that of the other. But such subsequent purchaser in order to be protected must not only have no notice by virtue of the records, but must also be a *bona fide* purchaser for a valuable

*42 Mich. 175; 47 Mich. 105.

consideration, and without actual notice of the prior deed. The party relying on the older deed must show that the subsequent purchaser had actual notice of his claim.*

Sec. 1551. A MORTGAGEE IS REGARDED AS A PURCHASER UNDER THE RECORDING LAWS.—Within the meaning of all recording laws a mortgagee, or conditional owner, is regarded as a purchaser. At the common law a mortgagee was the owner of a conditional estate, that is, one liable to be defeated upon the happening of the event, or payment of the sum designated prior to the day fixed. At the present time the title to the mortgaged premises does not pass to the mortgagee by virtue of the mortgage deed, the mortgagee having simply a lien upon the land to satisfy or secure his loan. But, nevertheless, within the meaning of the recording laws the mortgagee is regarded as a purchaser, and has the same rights as against subsequent purchaser as a grantee in a deed would have. In this regard some distinction is made between a mortgage given to secure a pre-existing debt, and one in which the consideration has been given at the time of the execution of the mortgage; the former not being regarded as a mortgage for value within the recording acts, while the latter is.**

*22 Mich. 410; 47 Mich. 102; 36 Mich. 363; 59 Mich. 590; 1 Walker Ch. 263. Notice to the agent is held to be notice to the principal in such cases. 22 Mich. 268.

**26 N. J. Eq. 445; 65 N. Y. 167; 23 Ill. 579; 48 Miss. 268; 26 Mich. 410.

Where a mortgage is given and part of the money which it secures has been advanced to the mortgagor on the presumption that the title is all right, and before the rest is paid, the mortgagee receives notice of a prior title—he is not justified in making any further payments to the mortgagor; and if he does so his mortgage as to such further payments will be regarded as subsidiary to the title of which he has received notice.*

*24 Mich. 360; 14 Mich. 154; 52 N. Y. 136.

CHAPTER XVI.

OF ABSTRACTS OF TITLE.

Sec. 1552. IMPORTANCE OF SUBJECT.—

One of the most important duties an attorney-at-law is called upon to perform is that of giving an opinion upon the title to real property. To be in a position to pass upon titles the lawyer should be familiar with both the common law and statute law as regards real estate, and especially that branch of the law which refers to the execution and recording of deeds and mortgages and other instruments affecting title or constituting liens thereon. While the statutes regarding the execution and recording of conveyances are very similar in the various states, they are not uniform.

Sec. 1553. ABSTRACT OFFICES.—In all the older settled portions of our country, and in the counties having a large population, the records have become so voluminous, that individuals or corporations have established what are known as, Abstract offices, which undertake, for remuneration, to furnish abstracts of title to real estate in the jurisdiction. In some cases these abstracts of title are guaranteed by the person or company making them, and in the large cities this class of work is done almost solely by the large corporations, who guarantee the abstracts they furnish. The value of such abstracts depend wholly upon the care with which they are made. And, as a

general rule they are unreliable, because they are not full and complete enough. They are of assistance in examining the title by one who desires to go to the original records. When such an abstract is given an attorney to base his opinion of the title to the land thereon, he should state that the opinion is based only upon the conveyances shown in the abstract. If the client desires a correct opinion, the lawyer should use the abstract simply as an index to the records to be examined, and frame his opinion from a careful examination of the original records and upon the legal sufficiency of each conveyance therein.

Sec. 1554. METHOD OF EXAMINING TITLE.—When called upon to investigate the validity of a title it is always advisable to procure an abstract of the title as a foundation for the work. Then write out carefully a description of the property, the title to which is in question. This description should be compared with each description in the line of conveyances to ascertain if the land is included therein. If it is a description by metes and bounds a diagram of the property showing the direction and distance of each line will be helpful. The descriptions will often be found imperfect and impossible ones, and incomplete in giving all the boundaries, and these defects should appear in the abstract, and be rectified if possible.

In tracing the title from the original grant, the abstractor may trace the title from the original grantor without any reference to any incumbrances placed upon the land by the various owners while in their posses-

ion, and then afterwards make an independent examination of these liens. Or, he may trace both the title and the liens thereon at the same time from the original grantor, step by step.

When an undischarged lien is discovered, the question arises as to whether or not it may be outlawed. If not, it is a cloud upon the title.

When there is an uninterrupted chain of title from the original grantor to each successive grantee, and the title has been transferred *inter vivos* by deed, the tracing of the title is very simple. But this is not usually the case, and it will be found that the property has been sold through the probate court or on execution to satisfy debts. In such a case it may be necessary to examine into the jurisdiction of the court, and the proceedings had, to ascertain whether they are regular and in accordance with law, and whether the sale of the property was regular and according to the order issued. While the middle names of the various grantors do not matter, yet it is important to see that the first name is the same as that of the party to whom the property was deeded.

The abstractor should examine each deed to ascertain if it has been properly executed and acknowledged in accordance with the law in force at the time of its execution, which may involve the question of satisfying the law as regards revenue stamps. The covenants of the deed should be examined also to ascertain if any easements are outstanding.

As to the dower interest of the husband or wife,

the deed, unless executed by both husband and wife, may be subject to an outstanding dower interest. And this is so though the acknowledgement recites that the grantor is single, since such a recital is no part of the deed. The abstractor must ascertain whether or not the grantor was single at the time or not, and if he does not know, the fact should be so stated in the abstract.

When there is a break in the title caused by the death of the owner and the sale of the property, or its distribution under the laws of descent to the heirs, it may be necessary to examine the records of the probate court with reference to the number, names and ages of the heirs, where the owner died intestate. Because if the owner died intestate his lands are divided among his heirs according to the provisions of the statute, each in his proportionate share. And where some of the children are dead and left issue, the issue will inherit under the statute. Where the owner leaves a will, and it is not contested, the land passes according to the provisions of the will.

Where the property of an intestate owner has not been sold the abstractor will often find that it has been partitioned, in a legal proceeding, among the heirs. When this is the case it is necessary to see that the proper steps have been taken, and that the property was by this proceeding given to the person through whom the title comes. But as the lands of a deceased owner pass to the heirs without administration or other proceeding, it may be sufficient if they have simply united in a transfer to the next grantee.

Where there has been no probate proceedings, then the abstractor must ascertain whether or not there has been any other judicial determination as to the number of heirs. By statute persons interested in the land may institute proceedings in order to determine who are the heirs of a deceased person where there is any doubt about it. In all such cases the abstractor should note the number of heirs that were named, and state that the record does not disclose whether there are any more heirs or not.

The break in the chain of title may be occasioned by a foreclosure of a mortgage, in which case the abstractor should see that the proceedings complied with the statutes governing foreclosures, as to advertising the sale and the like, for if these have not been complied with, the sale is void, and no title passes to the purchaser, unless he has gone into possession and retained such possession the statutory period to obtain title by possession.

In case there has been a foreclosure in equity, the abstractor should ascertain whether the court has acquired jurisdiction of the person made defendant, for if it has not the proceedings are void.

So in all cases where the title has been transferred by an attorney in fact, it should be seen that the power of attorney has been properly executed, and that the attorney in fact exercised the power given, and no other. Both the power of attorney and the deed should be recorded.

In tracing the incumbrances and liens placed upon

the title by the various owners, the abstractor may have more difficulty than tracing the title proper.

If there is a mortgage upon the land, and it has been paid, it should be discharged of record, or it still shows as an outstanding obligation, and constitutes a cloud on the title. It will be found that a great number of mortgages have been paid and satisfied in fact, yet have never been discharged or entered on the record as satisfied. Thus a party owing a mortgage will pay same and neglect to have the proper entry of the cancellation of the mortgage put upon record. Such mortgages may be subsequently discharged by the mortgagee entering upon the record that the mortgage is discharged; or the mortgagee may execute a release of the mortgage under seal and have it recorded. But where the mortgagee is deceased and the mortgage with the satisfaction is lost, suit to remove the cloud from the title may be necessary.

Where the land has been sold under an execution, it should be ascertained from the records whether there has been a valid judgment rendered, for without this there can be no valid execution and sale. If there is an execution levy it must be enforced in most states within a certain number of years, and in all states within the life of the judgment.

The abstractor is also required to examine what taxes have been assessed against the land, and whether there are any outstanding tax titles. Also ascertain if any special assessments or taxes have been levied for municipal purposes if the land is situated in a city or town.

Sec. 1555. LIABILITY OF EXAMINER OF TITLE.—One who makes an examination of title to land, and gives a certificate as to it, is not an insurer of the title; but becomes responsible for mistakes made through ignorance or want of care and legal knowledge. The general rule being, that one who holds himself out as capable of doing certain work, must possess the ability and exercise the care required, and is responsible for injury suffered by reason of his inability to do so.*

*70 Ill. 268; 4 Mo. App. 108.

BOOK II.

THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS AT COMMON LAW.

CHAPTER I.

THE SUBJECT INTRODUCED.

Sec. 1556. IMPORTANCE OF THE STUDY OF THE EARLY ENGLISH COMMON LAW PLEADING.—While the early common law system is no longer in use in an unmodified form, yet it is vitally connected with the development of American and English law to-day, and its study must ever be the foundation of a legal education. The remedial law of England was developed and enlarged through the medium of special pleading, so that the advances in the conception of rights are frequently associated with, if not the direct result of the like advances in the forms of pleading.

Again, the study of the common law system of special pleading is not only essential to the correct understanding of the historical development of the common law, but it is likewise an admirable and beneficial aid in intellectual training. It is said that no one can be a strong lawyer who has not, in addition to natural or acquired logic, a clear knowledge of the logic of the

law, and special pleading is regarded as the logic of the law.*

So issues cannot be properly presented for decision, either by court or jury, unless, in the first place, the litigants through their counsel, are capable of clearly conceiving the proposition of fact or of law upon which their claims rest. There must be a lucid and concise expression of those propositions. Such expressions must be relevant, and, so far as possible, single. After the propositions have once been stated, there must be no departure from them. A litigant must be compelled to pursue a definite and consistent course from the time he comes into court until he obtains his judgment. All of this, and much more, the litigant or his counsel acquires from the rules and principles of special pleading, developed by centuries of experience in the trial of causes at the common law. Under modern code pleading the tendency is away from special pleading, but the rules there devised for the development of a single and plain issue of law or fact must ever be regarded. And while the mistake of the pleader may now be easily remedied by amendment, and the consequences of the mistake are not so serious as at common law, yet it behooves the pleader to be familiar with the rules of pleading for his reputation's sake.

Sec. 1557. OF REMEDIES AND THEIR APPLICATION.—The vital principle of all systems of

*Perry's Common Law Pleading, 2-4.

laws is that a remedy must be given for every violation of right. But it is only for the violation of a legal right that a remedy or remedies are given. One may suffer great loss, or moral injury, and yet have no legal right violated for which he could have relief or vindication. In such cases it is said to be *damnum absque injuria*, and before any remedy will exist resort must be had to legislation to cover the particular case, and when they sanction the right, they do so by providing a remedy for its infringement.

In a state of nature, where neither rights or remedies are recognized, that is, rights and remedies as enforced by law, each individual would undertake to redress his own wrongs and protect his rights. This method of redress by the individual's own act is still permitted to some extent, and is called *self-help*. This sort of help or remedy may be classified as, 1: By the sole act of the party injured. 2, By the joint act of all parties concerned. By reason of the violence with which the redress of wrongs by individuals has always been accompanied, the progress of civilization has been marked by the restrictions placed upon this sort of remedy and the enlargement of the class of remedies applied through the instrumentality of persons not interested in the injury, as tribunals and judges, established for the purpose.

Self-help by the act of the party injured is still permitted to some extent, thus a party is allowed to do certain things in self-defense. This includes not only the defense of one's person, but also the mutual and

reciprocal defense of such as stand in the relation of husband and wife, parent and child, and master and servant. But the resistance must not exceed the bounds of mere defense and prevention, as otherwise the defender would himself become the aggressor.

Recaption of persons or goods is another right which a person may employ, when he has been deprived unlawfully of his goods, or is wrongfully separated from his wife, child or servant. The recaption must not be in a riotous manner nor attended with a breach of the peace.

So a person may enter upon lands, the possession of which has been unlawfully taken away from him, but such entry must likewise be peaceable.

A person may also abate nuisances, provided it can be done without a riot or breach of the peace.

An individual has also a remedy by *distress*, which is the summary taking of personal chattels out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction of the wrong committed. Thus, at the common law, a distress might be taken for, non-payment of rent in arrears; neglect to do suit to the lord's court, or to perform certain other personal service; for amercements in a court-leet; for injury by beasts wandering about *damage feasant*; and for certain penalties prescribed by act of Parliament. The distrainer could only take the chattel into custody, and was not permitted to make any use of it, and was obliged to take reasonable care of it. He was in a sense an officer of the law, and as such

held the chattel to answer the damage done. If the distress was illegal, the distrainor made himself liable to the owner in an action at law.

Self-help by the joint act of all parties concerned, includes:

1. *Accord*, or commonly called *accord and satisfaction*, by which is meant an agreement between the parties that the wrongdoer shall do or give to the party injured something in satisfaction of the injury, which agreement is followed by due performance. This performance duly accepted effaces the injury.

2. *Arbitration*, by which is meant the submission, under mutual agreement of the parties, of the controversy to two or more persons mutually agreed upon, called arbitrators, who are to decide it. The decision of the arbitrators, called the *award*, effectually determines the rights of the parties, except that it cannot transfer title to realty. But in such cases, as well as in many others, the parties give bond to perform the award, and a failure to do so is a breach of the bond.

There are two remedies which come about by the sole operation of law. These are:

1. *Retainer*, by which a creditor who has been made executor or administrator of his debtor's estate, is entitled to retain so much of the estate as will satisfy the debt owing to himself before he pays any debts of equal or inferior grade. The reason for this was that the administrator could not sue himself, and there was no one else to whom he might look for the satisfaction of his claim.

2. *Remitter*, by which is meant that where one is wrongfully in possession of land or other realty, under a defective title; or is out of possession though having a good title, and subsequently gets a good title, or gets possession under a defective title, by operation of law the title is *remitted* or sent back to his more perfect title, and the imperfect one disappears.

Sec. 1558. OTHER REMEDIES ARE APPLIED THROUGH THE INSTRUMENTALITY OF COURTS.—Where for the redress of an injury there is required the concurrence of the act of the party or parties, and the operation of law, courts are required.

A *court* is an institution of the state the purpose of which is to ascertain facts material to the controverted rights of parties, and to pronounce the legal effect of those rights.

The interposition of the court or courts is secured by means of an *action* or *suit*, which is “nothing else but the demand of right”, or a proceeding by which is sought the decision of the court of justice upon a right litigated between the parties.*

The act of at least one of the parties litigant is required to set the law in motion, and the process of the law is usually the only instrument whereby the parties are able to secure certain and adequate redress of in-

*This definition is from the Mirror, a very ancient legal treatise. An action is also defined as, “that formal course of proceeding, which a person seeking to enforce a right, is by law bound to adopt.” “Action at Law,” J. W. Smith, 41.

juries. Even where the law allows an extra judicial remedy, the ordinary remedy awarded by the court is not excluded.

Sec. 1559. CLASSIFICATION OF COURTS AS REGARDS THE KEEPING OF RECORDS.— Courts may be regarded as of two classes as regards the keeping of their records. These are: 1, Courts not of Record. 2, Courts of Record.

1. A Court not of record is one of whose proceedings no solemn contemporaneous minute is made by a sworn officer. Its proceedings are not enrolled or recorded, and they are regarded as matters of fact to be tried and determined by a jury, if a dispute arises concerning them.

2. A court of record is an organized judicial tribunal, having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common and statute law. The acts and judicial proceedings of such courts are recorded for a perpetual memorial. The records are called the records of the courts, and import absolute verity. Nothing can be averred against them, nor shall any plea, or even proof be admitted to the contrary. If the existence of a record be denied it shall be tried by itself, that is, by an inspection thereof by the court to ascertain whether or not it is a properly authenticated record.

Sec. 1560. CONSTITUENT ELEMENTS OF A COURT.—Every court is composed of at least three

constituent elements, as follows: 1, The *actor* or plaintiff, who complains of an injury done. 2, The *reus*, or defendant, who is called upon to make satisfaction for it. 3, The *judex*, or judicial power, who is to examine the accusation, to determine the law applicable to the premises, to find whether or not an injury has been done, and if so to ascertain, and by proper officers and machinery apply, the remedy.

Anciently rights and remedies were mere incidental results of form and procedure, but as systems of law developed, substantive rights and duties grew in importance, and mere form became of less significance, until now in the most highly developed systems of law, form is regarded only sufficiently to secure convenience and certainty in the administration of law and justice.

Sec. 1561. JUDICIAL MACHINERY UNDER THE ANGLO-SAXONS.—The Anglo-Saxon procedure in administering justice was very completely decentralized. The several counties of the kingdom each did separately and finally its own judicial work. Appeals were discouraged, and the administration of justice was crude and simple. At the head of each county, or *shire*, was a judicial officer called the "Shire-reeve," of whom our Sheriff may be regarded as the lineal descendant.

Sec. 1562. THE ADVENT OF THE NORMANS IN ENGLAND INTRODUCED A CENTRALIZED JUDICIAL SYSTEM.—With the advent of the Normans in England led by William the

Conqueror, was introduced a highly centralized system of tribunals for the administration of justice, in which the Grand Justiciar controlled absolutely. The Conqueror proceeded cautiously with the introduction of his system, not depriving the Anglo-Saxon tribunals of their jurisdiction, except as to criminal offenses of the clergy, and made it profitable for litigants to come into his court through the introduction of appeals from the lower court. The *Wittenagemote*, or council of wise men, of the Anglo-Saxons, was superseded by his highest court, called the *Curia Regis*, or King's court. This was attached to the king's person, was held in his palace, and followed him wherever he went, being the embodiment of royal justice administered by the king in person. This court had unlimited jurisdiction, and entertained appeals from all inferior courts.

Sec. 1563. ORIGIN OF THE COURT OF EXCHEQUER.—From about 1100 A. D., the Court of Exchequer appears as a distinct court. This court was composed of some of the king's principal officers of finance, and sat to receive the sheriffs and all other accountants and collectors of the crown, and to give acquittance to those who paid, and to issue writs and orders to enforce payment from those in default. By the development and use of various fictions the jurisdiction of the court became extended until it tried almost all classes of controversies between even private suitors.

Sec. 1564. INSTITUTION OF JUSTICES IN EYRE AND ASSIZES.—As the superior efficiency of the Curia Regis became recognized, it came to be overrun with suitors, so much so that in 1170 King Henry II. appointed justices to go about the kingdom and hear complaints in the various counties or districts. These justices were called Justices in Eyre, and this was the origin of the judicial circuits which continued from this time on. Henry II. also instituted the Assizes, whereby litigants were enabled to escape the jurisdiction of the local court, with its ordeal of battle, and refer themselves to the judgment of the king's justices for the trial of their causes.

Sec. 1565. ORIGIN OF THE COURT OF COMMON BENCH OR COMMON PLEAS.—The increase of suitors in the Curia Regis increased the inconvenience caused by the court's following the king from place to place, and became a subject of great complaint, so that in 1215 King John was compelled to promise among other things in Magna Charta, that common pleas shall no longer follow the Court, but shall be held in some place certain. Thus arose the Common Bench, or Court of Common Pleas, which was established and held at Westminster, and there remained until the consolidation of the English courts under the Judicature Act of 1873.

Sec. 1566. THE COURT OF KING'S BENCH.—The great, and to some extent, arbitrary powers of the king's chief justices caused much dissatisfaction.

In a contest between rival chief justices, as a result of which both lost their offices, one by death, the other by resignation, the Curia Regis lost its administrative functions. No successors to the chief justices were appointed, but instead a chief justice for holding pleas before the king, from which arose the court of King's Bench, about the year 1268.

Itinerant justices, or Justices in Eyre, were first appointed in 1170, and in 1179 all England was divided into four circuits, and five justices were appointed for each. These included the six justices of the Curia Regis. About this time trial by inquest, the origin of the present jury trial, and the great Assize were introduced. By means of the itinerant justices and the Assizes all issues of fact involved in the royal courts at Westminster could be determined in the respective counties where the causes arose, thus avoiding the expenses of taking the witnesses and jurors up to Westminster. The verdicts rendered in the several counties at the assizes were certified back to the appropriate Westminster courts for judgment, thus keeping the administration of judicial matters as completely centralized as when first introduced by William. After 1335 no more Justices in Eyre were appointed, circuits were thereafter perambulated by the judges of Assize and *Nisi Prius* (unless sooner), the latter so called, because the writ to the sheriff of the county wherein the cause arose commanded him to have at Westminster on a day certain, a jury of the body of his county for the trial of the cause "unless sooner"

the court or some of its judges went down to the county there to try the question of fact.

Sec. 1567. JURISDICTION OF THE COURT OF KING'S BENCH.—The Court of King's Bench was the remnant of the Curia Regis. Like that great court, it purported to be presided over by the king in person, although for centuries the king took no part in its deliberations. It possesses the residuum of the ancient jurisdiction of the Curia Regis which was not allotted to the other courts. Its judges are by their offices the sovereign conservators of the peace, and it has thus jurisdiction of all criminal matters, and all civil actions where the wrong alleged is criminal in its nature, as trespass, or other injury *vi et armis*, conspiracy, deceit, and the like. By fictions it extended its jurisdiction to almost all cases except those involving title to land. It is a court of record, and also a court of appeal into which may be removed, by writ of error, all judgments of the Common Bench, and of all inferior courts of record in England. It also superintends all civil corporations, and commands by mandamus magistrates and others to do what their duty requires in every case where there is no other specific remedy.

Sec. 1568. JURISDICTION OF THE OTHER COURTS.—The Common Bench or Court of Common Pleas, is a court of record. It was originally the great common law tribunal which acquired exclusive jurisdiction of pleas or causes between subject and subject or private persons. It also retained its exclusive

jurisdiction of real actions, and was styled the lock and key of the common law.

The Court of Exchequer was a court of record, and was originally concerned with the accounts of the king's collectors, but enlarged on this jurisdiction in matters of accounts and the like.

The Court of Exchequer Chamber was an exclusively appellate court, composed of the judges of any two of the great Westminster Courts, sitting to revise judgment of the third.

The House of Lords is the supreme judicial tribunal of England. It is the court of last resort in all civil actions. When sitting as a court, only those peers sit who are versed in the law, known as the "Law Lords," many of whom have filled high judicial stations, and in many cases have been advanced to the peerage by reason of their high eminence in their profession.

Among the courts not of record, below the Common Bench, may be mentioned, the County Court, which was a court incident to the jurisdiction of the sheriff. It could hold pleas of debt or damages when the amount involved was under forty shillings. Below this was the Hundred Court, the Court Baron, and the Piepoudre court, all of which are fully explained by Blackstone.*

Sec. 1569. CONSOLIDATION OF THE ENGLISH COURTS BY THE JUDICATURE ACT.
—In 1873 the English courts of common law, and all

*3 Bl. Com. 32-58.

the superior courts were merged into a Supreme Court of Judicature, which consisted of two permanent divisions, as follows: The High Court of Justice, and the Court of Appeals. An appeal will lie from the High Court of Justice to the Court of Appeals, and from the Court of Appeals to the House of Lords. In the House of Lords, appeals are heard before the Lord Chancellor, Lords of Appeal in Ordinary, and those peers who have held high judicial offices, and not by the entire body of peers. Three Lords of Appeal must be present to hear every case.

The High Court of Justice has original jurisdiction with appellate jurisdiction from the inferior courts. It consists of five divisions, as follows: 1, The Chancery Division. 2, The Queen's (or King's) Bench Division. 3, The Common Pleas Division. 4, The Exchequer Division. 5, The Probate, Divorce and Admiralty Division.

In 1881, the Queen's Bench, Common Pleas and Exchequer Divisions were united into one court, called the Queen's Bench Division, so that at the present time there are in England this court, and the two others above mentioned, with the Court of Appeals and the House of Lords.

Sec. 1569a. ORGANIZATION OF COURTS IN THE UNITED STATES.—In the United States the courts may be divided into two classes: Federal Courts, and State Courts. The first organized under acts of Congress by the National Government, and the others by act of the various legislatures under the

State constitutions. These courts have been already considered in Volume II of The Home Law School Series, under the subject of Constitutional Law.

Sec. 1570. OF THE VARIOUS KINDS OF JURISDICTION.—Jurisdiction means the power to adjudicate, or the power to hear, investigate and determine a cause of action. So that when it is said that a court has jurisdiction it means that it has power to entertain the suit and decide it. The jurisdiction of our courts is determined by the Constitution and the Legislature. The jurisdiction of courts may be classified as follows: 1, Original. 2, Appellate. 3, Exclusive. 4, Concurrent. 5, General. 6, Special, 7, Limited. 8, Territorial.

1. Original jurisdiction is that which is invoked at the commencement of a suit, and is distinguished from—

2. Appellate jurisdiction, which reviews, corrects, and revises the proceedings in a cause already begun in some other court.

3. Exclusive jurisdiction is where the consideration of the subject matter belongs solely to the court exercising it, or which gives to one tribunal the sole power to try the cause.

4. Concurrent jurisdiction is that which is possessed over the same parties or subject matter at the same time by two or more separate tribunals. In such cases the court first exercising the jurisdiction tries the cause.

5. General jurisdiction is where the courts enter-

tain jurisdiction of all matters of a civil nature, even if they be limited as to parties.

6. Special jurisdiction means that the courts having it can only take jurisdiction upon the special matters which the statute has specially conferred upon them, and the statute itself defines these special matters.

7. Limited jurisdiction, where the courts are generally limited and confined by the subject matter, or the character of the subject matter, or by the parties.

8. Territorial jurisdiction means the limitation of the court's jurisdiction as regards the extent of territory within which it is to be exercised.

In England the courts having appellate jurisdiction were: the King's Bench, Exchequer Chamber, and House of Lords.

In the United States appeals lie from the common pleas court to the higher courts in their respective order.

Sec. 1571. SCOPE OF THE SUBJECT OF PLEADING.—The word plea, or pleading, is used in various significations; thus it may mean to litigate or carry on a suit or action. In a stricter sense it means that part of an action consisting in the allegations of the respective parties. And in a more strict sense to make an allegation of fact in a cause. And in its most limited sense, a *plea* is the allegation of fact made by the defendant as an answer to the *declaration* of the plaintiff in an action. But the expression, *pleading*, as a branch of the law, or when coupled with the word

practice, as pleading and practice, means more than the draughting the usual forms of written statements of the respective parties in a suit; more than the statements themselves, and the oral advocacy of a cause in court, and may be said to include the whole science of conducting a cause from its commencement to its finish; thus the selection of the proper tribunal, with the requisite jurisdiction; the choosing of the appropriate form of action; making of the essential allegations to constitute the wrong complained of or a good cause of action; the application of the rules of correct pleading in the formulation of the issue to be submitted to the tribunal, as well as the observance of the various rules of court providing the method of commencing, conducting and terminating a suit at law.

Sec. 1572. AUTHORITIES ON THE SUBJECT OF COMMON LAW PLEADING.—The rules of the common law applicable to pleading are recognized in every state where the common law system still prevails, and are the basis of all pleading, even under the Civil Codes, which abolish special forms of action and otherwise simplify the method of procedure in the trial of a cause. Hence we find the English authorities on common law pleading, with American notes, among the leading authorities here. Among these may be mentioned the works of Chitty and Stephen; the former work having reached its 16th American edition, and the latter being re-edited by a number of authors, as Heard (1867), Tyler (1871), Andrews (1901). Books of practice with rules of

pleading and forms are to be found in almost every state, and these, on account of being particularly adapted to the special practice prevailing in the state, are usually purchased by the profession. It is unnecessary to name these authors here, as their works may be found by reference to any law publisher's catalogue. An Encyclopedia of Pleading and Practice, in twenty-three volumes, is published by the Edward Thompson Company.

In the Code States, that is, those states having adopted the code of civil procedure, the subject of pleading is simplified by doing away with all special actions, and having but one form of action for all causes, styled a civil action; providing that litigants be called plaintiff and defendant, and abolishing feigned issues. A number of authoritative books on Code Pleading have appeared, among which we mention those of Bates, Bliss, Abbott, Maxwell, Phillips and Pomeroy.

CHAPTER II.

OF FORMS OF ACTION AT COMMON LAW.

Sec. 1573. GENERAL CLASSIFICATION OF ACTIONS.—The most ancient classification of actions is into *real, personal and mixed*. From the earliest times the *actor* or plaintiff had to make a statement of the wrong complained of with a claim for redress in a civil action. These formal assertions came, at an early period, to group themselves into actions for a debt; actions for movables, and actions for real property. In addition there were those actions which involved criminal matters, which were called *pleas of the crown* at common law, as distinguished from civil actions, called *common pleas*.

With the introduction of the Curia Regis of the Normans, jurisdiction was given by king's writ, which issued out of the Chancery, by reason of which the formal actions were added to, and yet the rigor of the previous actions were not lost sight of, and after a time the same system of precedents prevented the Chancellor or his clerks from issuing any but the formed writs, and this continued until the Statute of Westminster II. (13 Edw. I., Ch. 24) was passed authorizing the issuing of new writs.

We shall first consider briefly the formed actions which had developed previous to this statute, and

which were divided into real, personal and mixed actions.

Sec. 1574. THE FORMED ACTIONS DEFINED.—Real actions are those brought for the specific recovery of lands, tenements and hereditaments.

Personal actions are those brought for the specific recovery of chattels, or for damages or other redress for breach of contract, or for other injuries of any description except those redressed in real actions.

Mixed actions are those brought for both the recovery of realty and damages for injuries sustained in respect of such property.

Owing to the backward condition of commerce and manufactures in the early history of the law, land and its immediate products for a long time constituted almost the entire body of wealth, so that real actions were of relatively greater importance than the others.

Sec. 1575. KINDS OF REAL ACTIONS.—All real actions were at first included under the following divisions: 1. Writs of Right, so-called. 2. Writs in the nature of Writs of Right.

1. Writs of Right dealt not merely with *seizin* or possession of land, but with the *jus*, or right to its possession. They applied only to fee simple titles. The judgment in a trial of the writ of right was absolutely conclusive, so that the courts proceeded with great deliberation in such cases. Collateral proceedings were allowed, such as vouchers to warranty, by reason of which the actions sometimes extended over a great

length of time, and even beyond the lifetime of the plaintiff or demandant.

2. Writs in the Nature of Writs of Right were so called because some of them might be brought by a *life tenant* or a *tenant in tail*. But in many of such actions relief was sought for other things than injuries to the mere right to realty.

As the Anglo-Saxon law had no merely possessory action, the defect was remedied in the reign of Henry II, by providing the *assize of novel disseisin* in 1166, which enabled the party disseized, regardless of the nature of his title, to recover the possession. Which writs were extended and made to lie in favor of the heir of the disseisee and against the heir of the disseisor. All of these writs were long since rendered obsolete by other remedies.

Sec. 1576. KINDS OF MIXED ACTIONS.—The principal *mixed* actions are: 1. Quare Impedit (wherefore he obstructed), by which, when the right of a party to a benefice was obstructed, he could recover the presentation. 2. Waste, by which the owner of land, could recover the land and treble damages for the injury committed thereto by the tenant. This action was largely supplanted by the equitable remedy by injunction, which was more efficient.

Sec. 1577. KINDS OF PERSONAL ACTIONS.—There was little demand in early times for personal actions, as this was a sort of property that was not as common as at present. In addition the idea of a con-

tract as an *agreement* between the parties was not developed. The fact that the minds of the parties had met in agreement was not of importance to them unless some overt and visible act or ceremony had taken place. The ancient contracts were *real*, in the sense that they depended upon a fact other than the agreement of the parties. Thus the recipient of a pledge was bound to hand it back, if within due time its owner came to redeem it. This was the pledgee's *duty* rather than his contract obligation. If the pledge was not restored, the owner would reclaim it on the ground that the other unjustly detained what was his, and not because he had promised to give it back upon the performance of the obligation, which had been fulfilled. Personal actions were regarded, therefore, as largely *ex delicto* in character, although this division of actions into *ex contractu* and *ex delicto*, was not made until recent times.

Of the ancient personal actions, five, Debt, Detinue, Covenant, Account and Scire Facias, are said to come under our modern idea of actions *ex contractu*. While personal actions in *tort* or *ex delicto*, were Trespass and Replevin.

Sec. 1578. SAME SUBJECT—DEBT.—In the action of Debt, the idea is that the creditor is being *deforced* of his money, just as the demandant who brings a writ of right is being deforced of his land. The modern action of debt is lineally descended from the *writ of right* for money debt, and is therefore, in its origin, what that always was, a *real action*. Even

so late as 1300 the action of debt was rarely employed save to obtain money lent, the price of goods sold, arrears of rent due upon a lease for years, money due from a surety, and a fixed sum due upon a sealed instrument. As the action is independent of what we designate as a contract, it can be used whenever a fixed sum is due from one man to another.

As later developed the action of debt was employed to recover money in four classes of cases: 1. On records, as upon the judgment of a court of record, a recognizance, a statute merchant, a sheriff's return of *feri feci*, upon which he had not turned over money collected. 2. On a statute prescribing a penalty. 3. On a sealed instrument. 4. On simple contracts and legal liabilities for a sum certain. But in none of these cases was the action of debt sustainable unless the demand was for a *sum certain*, or readily to be made certain by computation. The sum being certain, and for a *debt*, the damages recoverable were nominal, being usually confined to interest on the amount claimed.

The declaration in debt, on a simple contract, must show the fact from which the duty to pay arises, and should state either a legal liability or an express agreement, though not a promise to pay the debt. On sealed instruments, records, the action is supported by the specialty or record, *profert* of which should always be made, or the omission explained. The controlling feature of the action of debt, is, an *omission of duty* on the part of the defendant in not paying a

certain sum of money, rather than for a breach of a contract to pay.

Sec. 1579. SAME SUBJECT—DETINUE.—The action of *detinue*, originally identical with *debt*, slowly differentiated from it. In the writ or action of debt, the language used was, *debet et detinet* (owes and detains). It appeared to the legal experts that in some cases the word *debet* ought not to be used, as where a specific chattel had been loaned; and where the original debtor or creditor had died, it was thought that simply *detained* covered the case better than *owes* and *detains*. In order that the proof might not differ from the facts stated in the declaration or pleadings, the action of *detinue* began to appear, so that it soon became a rule that if a particular object was claimed, the pleader never said *debet*, but only *injuste detinet*. It appearing that the idea of an obligation arising in contract began to be distinguished from a duty to return a specific chattel. So that *debt*, in the sense of owing, as on a contract, was distinguished by a different action from detaining, which latter action became *detinue*.

Detinue is the only remedy by suit at law for the recovery of a specific chattel in specie, except in those cases where *replevin* lies. It could not be maintained to recover realty, and the goods and chattels for which it lies must be distinguished from others by some certain identification. One having the right of property in goods, and also the right of immediate

possession, may support this action although he has never had the possession. But if his interest be only in reversion, and he has not the right to immediate possession, he cannot sustain it.

Detinue lies wherever a specific chattel is withheld by the wrongdoer, whether it was originally taken lawfully or unlawfully. If the defendant claim that the goods were pledged to him as security for a loan still unpaid, or if he assert a lien of any kind on the goods, he must plead the same specially. The declaration should contain a statement of the plaintiff's right to the goods in question, describing them with such certainty as to identify them, and should aver that they are in the defendant's possession, that the defendant acquired such possession by *finding* the said goods, or by their *bailment* to him; that he holds such possession subject to the plaintiff's right to have the same on demand, and that such *demand* has been made and *refused*. Then the value of the goods should be stated.

Sec. 1580. SAME SUBJECT—COVENANT. —Covenant is the action brought for the breach of an agreement expressed in a deed, that is, a writing sealed and delivered. The agreement must be made in this formal way in order to be binding. The limitations upon the action of covenant were soon apparent, it could not be employed for the recovery of a debt, although the debt be attested by a sealed instrument, since a debt could not have its origin in a covenant, but must arise from some transaction as a sale or

a loan. Covenant is the only remedy at common law for the recovery of unliquidated damages for the breach of a contract under seal. And at the common law no person could support an action of covenant, or take advantage of any covenant or condition unless he were a party or privy thereto.

The declaration in covenant must state that the contract was under seal, and should usually make profert of such contract or excuse the omission. If performance of a condition precedent is required, to establish the plaintiff's right of action, such performance must be averred. Only so much of the covenant as is essential to the cause of action should be set forth, and that not in full but according to its *legal effect*. The breach may be alleged in the negative of the words of the covenant, or according to the legal effect. Several breaches may be assigned. Damages being the main object of the suit, they should be laid in a sum sufficiently large to cover the real amount claimed.

Sec. 1581. SAME SUBJECT—ACCOUNT.—In the action of *account* the defendant was called upon to render to the plaintiff justly, and without delay, a certain thing, to-wit: an *account* of his receipts and disbursements during the time he was the plaintiff's bailiff, and, as such officer, receiver of his money. This obligation does not rest upon contract but upon a situation or relation. The court first found whether or not the relation existed and if so it rendered an interlocutory judgment, *quod computet* (let him ac-

count). Then auditors were appointed who stated the particulars of the account. This action would lie only where the amount sought to be recovered was uncertain and unliquidated. It has been superseded, save in a very few of the States, by the equitable remedy for an accounting.

Sec. 1582. SAME SUBJECT—THE WRIT OF *SCIRE FACIAS*.—The writ of *scire facias* derives its name from two necessary words in the writ in the Latin form: "*Quod scire facias præfat John Doe, quod sit coram,*"—"That you (the sheriff) shall cause the aforesaid John Doe to know that he must be before us, etc."

Scire facias is an action which is always founded on a record, and the proper writ or action for enforcing compliance with all obligations of record upon which an execution cannot issue, whether by reason of lapse of time, change of parties, or their inherent nature. If the obligation imposed by the record be that of paying a liquidated sum of money, either *debt* or *scire facias* may be used. But if the obligation be of a different nature, *scire facias* is the only action which can be grounded upon the record. In all cases where a new person, who was not a party to a judgment or recognizance, derives a benefit by, or becomes chargeable to the execution, there must be a *scire facias* to make him a party to the judgment.

Sec. 1583. SAME SUBJECT—THE FORMED ACTIONS IN TORT—TRESPASS.—Of the form-

ed actions in tort, or *ex delicto*, there were only two: Trespass and Replevin.

According to the old common law a felony could be prosecuted by an appeal, that is, by an accusation in which the accuser must, as a general rule, offer battle. The appeals *de pace et plagis* (of peace broken and blows given) became, or rather were in substance, the action of *trespass*, which is still familiar to the profession. The action of trespass is an attenuated *appeal*. The charge of felony is omitted; no battle is offered, but the basis of the action is a *wrong* done to the plaintiff in his body, his goods, or his lands by force and arms and against the king's peace. It was because of the quasi-criminal character of this action that jurisdiction over it was asserted by the King's Bench, which court alone held Pleas of the Crown, or criminal causes. In course of time the cases of trespass grouped themselves into three great divisions. These were:

1. *Trespass de bonis asportatis*, (for goods carried away), where violence was done to the plaintiff's goods.

2. *Trespass de clauso facto*, (for a broken close) or *quare clausum fregit* (wherefore he broke the close) where violence was done to the plaintiff's land or things thereto attached.

3. *Trespass vi et armis*, or trespass by force and arms, where violence was done to the plaintiff's person.

In the action of trespass, the intention of the wrong

doer is immaterial. The action cannot be maintained where the wrong complained of was a mere *nonfeasance*; or where the matter affected was intangible, as reputation or health, and so not capable of immediate injury by force; or where the right invaded is incorporeal, as an incorporeal hereditament of any sort; or where the plaintiff's interest is in reversion and not in possession; or where the injury was not immediate but only consequential; or where the act complained of was not the direct act of the defendant, but of his servant in the course of his employment; or generally, when such act was not unlawful in its inception. In such cases force does not actually exist, and cannot be implied, and the idea of force is an essential element in trespass.

Trespass *de bonis* lies for a forcible injury to the possession of goods affected, and is sustainable by one who had at the time of the injury the right to immediate possession as against the trespasser. Possession being implied in one who has the power to assume immediate control over property.

Trespass is also the proper remedy to recover damages for an illegal entry upon, or an immediate injury to, corporeal real property in the possession of the plaintiff. The gist of the action being the injury to the possession of the realty, unless at the time of the injury being committed the plaintiff was actually in possession, he cannot maintain the action. Trespass for an injury to realty can only be supported when the injury is immediate, and was committed with force

actual or implied. And though the original entry of a party be lawful, yet a subsequent abuse by him of the authority conferred will make the party a trespasser from the beginning.

Trespass may be supported for injuries inflicted by the defendant's animals, if they were known by him to have proclivities for such acts.

The declaration in trespass should contain a concise statement of the injury complained of, and should always allege that such injury was committed by force and arms, and against the peace (*vi et armis* and *contra pacem*).

Sec. 1584. SAME SUBJECT—REPLEVIN.—Replevin is an action by which where goods have been illegally distrained, or were charged to have been illegally detained, their owner could at once regain possession of them. This was its peculiar characteristic. But before the plaintiff could get this writ of replevin, he was required to give security that he would prosecute the action against the alleged tortious taker to determine the right to the chattel, and if the right should be determined against him, the plaintiff, to return them to the taker, the defendant in the action. If the sheriff made return to this writ that the defendant had *eloigned* (removed afar off) the chattels, or that they were dead, or the like, then the plaintiff could have a *capias in withernam* (you shall take as a further distress), authorizing the sheriff to seize so many of the defendant's cattle as were equivalent in value as those distrained. In his declaration the plaintiff

alleged if he had recovered his chattels, that the defendant had detained (*detinuit*) them, and could recover damages only for the detention; but if he had not recovered his chattels, then he alleged that the defendant detains (*detinet*) them, and he could recover damages not only for the detention, but also for the value of the goods. These forms were called respectively, replevin in the *detinuit*, and in the *detinet*; and if only a part of the goods were recovered the action was in the *detinuit* as to them and in the *detinet* as to the others.

Replevin can be supported only for taking a personal chattel, and not for an injury to things affixed to the freehold. The plaintiff must at the time of the tortious taking have had either the general property in the goods taken or a special property in them as bailee, pawnee, mortgagee, or the like. Replevin cannot be supported if the plaintiff have not the right of immediate possession, and at the common law it lay only for an unlawful taking. In this action both parties are considered as *actors* or plaintiffs. The defendant, having distrained, is called upon to justify his action. This he does in his plea, which, as it contains the defendant's justification and presents the real question to be tried, that is, the legality of the distress, is essentially a declaration, and the plaintiff's replication a plea; so that, in this action the pleadings are all postponed one step. Instead of justifying the defendant may deny the taking of the chattels as alleged, or may claim property in them. The action is local

and the declaration must have certainty of place and description, as well as the number and value of the goods taken. The judgment, when for the plaintiff, is that he recovers his damages and his costs; when for the defendant, at common law, it was *pro retorno habendo* (to have a return) to him of the goods taken in replevin.

Sec. 1585. INADEQUACY OF THE FORMED ACTIONS.—These formed actions were in many ways inadequate. Thus they afforded no remedy for injuries to incorporeal hereditaments; nor for the enforcement of an agreement not under seal; nor for injuries to reputation; nor to health; nor for acts of omission, of negligence, or of deceit; nor for violation of personal rights not in possession. So the remedies for debt not evidenced by judgment or sealed instruments, or based on a statute, and for the specific recovery of chattels, were miserably inadequate.

Sec. 1586. ENLARGEMENT OF REMEDIES BY STATUTE OF WESTMINSTER II.—To remedy some of the defects of the formed actions, the famous statute of Westminster II (13 Edw. I, Ch. 24), was passed in 1285; authorizing the chancery to frame new writs (*de consimili casu*) in cases similar in principle to the old. Thus writs of *trespass on the case* began to appear. They stated a ground of complaint analogous to, but not quite amounting to a trespass as sued for in the old writs. Such a wrong was called *a trespass on the case* because the writ was very

like a writ of trespass, and the facts constituting the cause of action were set out quite fully, so that the plaintiff's case appeared in considerable detail in the writ.

Sec. 1587. ACTIONS FOR TRESPASS ON THE CASE.—Actions on the case lie generally to recover damages for torts not committed with force actual or implied, as was required in the original trespass writs; or for acts committed by force when the thing is intangible; or when the injury is indirect and only consequential; or where the interest in the property affected is only in reversion; or where the wrongful act is done not directly by the defendant but by his servant in the course of the master's business, even without his authority. So the action on the case is the proper form of action for the wrongful and malicious use of legal process, for injuries to health and reputation, for misfeasance, for seduction, criminal conversation, and the like. It is also the proper action for fraud, misrepresentation and deceit, independently of written contract.

The declaration in an action on the case ought not to allege the injury to have been committed *vi et armis*, nor should it conclude *contra pacem*. In other points the form of the declaration depends upon the particular circumstances on which the action is based, and consequently there is a greater variety in this than in any other form of action.

Sec. 1588. ASSUMPSIT.—In 1520 it was first decided that under the Statute of Westminster II, al-

lowing new writs in like cases, that one who sold goods to a third person on the faith of the defendant's promise that the price should be paid, might have an action on the case on such promise, thus introducing the whole law of parol guaranty. It was speedily recognized that cases in which the plaintiff gave his time or his labor were as much within the principle of the new action as those on which he parted with his property. The line of thought on which these results were reached seems to have been developed through the following steps; the action on the case lay originally for a *mal* feaseance, and without much difficulty it was extended to *mis* feaseances, and finally, after a long struggle, it was extended to purely *non* feaseances. In this form it was applied to executory contracts not under seal, and thus became established the action of *special assumpsit*. Every such contract required a consideration to support it and render it enforceable.

The next step was taken in 1609 when the courts introduced or admitted the idea of an implied promise, as when the defendant received and accepted goods from the plaintiff under circumstances negating the idea that a gift was intended, he was held to have impliedly promised to pay what they were reasonably worth. This action on an implied promise is *general assumpsit*, and this form of action is also applied to quasi-contracts, which in truth are not contracts at all, but merely certain obligations, largely equitable in their nature, that the law courts enforce under the

form of a contract action as the action for the recovery of money paid under a mistake of facts.

The action of *assumpsit* upon parol contracts came in time to be regarded as contract actions, but they had the marks of their *ex delicto* origin strongly impressed upon them. The plaintiff declared, that "the said defendant, not regarding his said promise, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the plaintiff, etc." In this action, after verdict, the judgment could not be arrested merely because the defendant had pleaded "not guilty," as there was a deceit alleged.

As developed, the action of *assumpsit* (he undertook) became the characteristic remedy for the recovery of unliquidated damages for the violation of an express contract not under seal, or of a promise implied by law from an executed consideration or from a legal duty. If the action were based upon an express promise, it was *special assumpsit*, otherwise it was *general assumpsit*.

Assumpsit cannot be based upon an obligation created by a sealed instrument or based upon a record, although the fact that the obligation is *collaterally* secured by such deed or record does not prevent bringing *assumpsit* upon the main obligation. Nor can *assumpsit* be brought upon facts excluding the idea of contract, except in those cases coming under quasi-contract.

General *assumpsit*, or the *Common Counts*, as they

are commonly called, cannot be supported by proof of a special executory contract, for the law will not imply a promise where an express promise exists. But if the contract has been fully executed by the plaintiff, he may introduce under the common counts, evidence of the work and labor he has performed, the materials he has furnished, the money he has loaned to the defendant, and the like. So, also, if the special contract is void, or has been abandoned, or if abandonment by the plaintiff is justifiable, *general* assumpsit may be brought.

The *common counts*, so called, were for money paid to the defendant's use; for money had and received by the defendant under circumstances imposing upon him the obligation of paying it over to the plaintiff; for money loaned to the defendant; for interest on such a loan, or on forbearance of money; for balance due from the defendant upon an *account stated*, or agreed upon; for use and occupation of land; for board and lodging; for goods sold and delivered; for goods bargained and sold; for work, labor and materials. In these common counts, circumstances were also alleged which created the duty or obligation to pay, and the promise to pay was implied from this consideration. Nothing but money could be recovered under the common counts. The declaration in assumpsit must invariably disclose the consideration upon which the contract was founded; the contract itself, whether express or implied; and its breach by the defendant. The claim of damages should be laid

large enough to cover the real amount of money claimed.

Sec. 1589. TROVER.—As the wager of law was a legal method of defense to *detinue* as well as to debt, it became as desirable to substitute a new action for *detinue* as it was to have *assumpsit* in place of *debt*. Accordingly, with the progress of pleading, there was developed the action of *trover*, (from the French verb *trouver*, meaning to find), which was based upon a supposed *finding* by the defendant of the thing demanded, and *converting* it to his use. Gradually the allegation of finding became a pure fiction, and the defendant was not permitted to traverse (deny) it. Trover thus became sustainable against any person who had in his possession, no matter how that possession was acquired, the personal property of another, and who sold or used that property without the consent of the owner, or refused to deliver it upon the owner's demand. The injury lies in the *conversion*, and the action is brought for the recovery of damages to the value of the thing converted, and not to recover possession of the chattels themselves. Satisfaction of the judgment for the plaintiff transfers the title to the chattel to the defendant, the same as if he had paid the purchase price.

Trover lies only for the conversion of some personal chattel, and not for injuries to real property. It is sustainable only for *specific articles*, but as only damages are demanded the description need not be so specific as in *detinue*.

In order to support the action of *trover* the plaintiff must have had at the time of the *conversion* a general or special property in the chattel converted, and either the actual possession, or the right to immediate possession. Generally, if the property be only special, the possession must have been actually in the plaintiff, but there is an exception to this rule, in the case of one who has also an interest in the goods converted.

Conversion may consist in a wrongful taking, or an illegal assumpsit of ownership, or an illegal use or misuse of the chattel, or its wrongful detention. But a mere omission or non-feasance is not sufficient to support *trover*. Where the plaintiff is not prepared to prove a wrongful taking, or a wrongful use, or the like, he must make an actual demand upon the defendant before bringing suit, and must prove such actual demand and the defendant's refusal thereof, or such neglect to comply as amounts to a refusal. Such demand and non-compliance are *prima facie* evidence of a conversion, which the defendant may rebut by showing that the chattel was lawfully in his possession, and that he lost it through negligence; or that he was uncertain as to plaintiff's title and offered to deliver the chattel to the true owner; and the like. There is no conversion unless the act complained of amounts to a denial of the plaintiff's right to possession. If the chattel has been once converted, its restoration to the plaintiff, or a tender of it will not cure the injury, such tender will only mitigate damages. Where it is doubtful whether the evidence will estab-

lish a conversion, a *count in case*, for negligence, should be joined.

One joint-tenant or tenant in common or co-parcener cannot support trover against his co-tenant, unless the latter has destroyed or sold the chattel in question, as each has a right to its possession.

For a wrongful taking, trover may be brought concurrently with trespass; but trespass will not lie where the taking was lawful or excusable. The declaration in trover should state that the plaintiff was possessed of the goods in question as of his own property; that they came into the defendant's possession by finding, and that the defendant converted them to his own use, to the damage of the plaintiff in the sum of \$. . . . dollars. The damages should be alleged large enough to cover the value of the goods, and the loss through their detention, judgment being for damages and costs. The allegation of *finding* is not traversable, and its omission is cured by verdict.

Sec. 1590. EJECTMENT.—The development of the action of *ejectment* furnishes probably the best illustration of the use of fictions that is to be found in the history of the common law. Originally the termor, or tenant might have an action in *covenant* against the lessor or his heirs, if he was ejected from the term, and if the lessor was the ejector the lessee might also recover possession, but he could not recover possession from the lessor's feoffee; and against a stranger the termor had no remedy whatever. Such ejectment by a stranger was a disseisin of the lessor,

and if the lessor recovered *his* seizin, such recovery did not inure to the benefit of the lessee or termor.

About 1235, a new action—*quare ejecit infra terminum* (wherefore he ejected him during his term)—was given the termor, by which he could recover possession from his lessor's feoffee. And in 1371, the new writ of *ejectione firmæ* (ejectment from the farm) appeared. This new writ was in the nature of a writ of trespass, and lay against *all* ejectors who were strangers to the title, but it gave only damages to the plaintiff. As possession was the main thing the tenant desired to recover, the disappointed suitors began to apply to the court of equity, which was about this time broadening its jurisdiction with great success. And thus under stress of competition, the common law courts awoke to the fact that they could also restore *possession* in ejectment proceedings. This occurred somewhere between 1455 and 1499.

From this time on the action of ejectment begins to take on its modern form, and it is regarded as an action by which the court can restore a termor to the possession of his term if ejected by a stranger or even by his lessor, and also give him damages; and incidentally, it will try the title of the lessor, for if he had no title the term was void. The question of title could therefore always be raised by the defendant's plea of not guilty. Hence this action permitted the trial of the title, but only when a *real ejectment* occurred, and in its trial of the title it simplified the long, intricate and costly process of a real action.

By reason of being a simplified way of trying title to real property, it offered inducements to the form-enslaved lawyers and courts of that time to adapt it to the trial of title in all cases. But to do so they had to bring themselves nominally within the purview of this action of *ejectment*. They created a lease for the express purpose of trying titles. The claimant out of possession entered on the land with some friend to whom he sealed and delivered a lease for a term of years. This artificial lessee remained upon the land until the adverse party, the actual occupant, came upon the freehold, that is, saw him and went towards him, when he was deemed to have been ejected. The artificial, or specially created lessee, now brings suit against the occupant and serves upon him a writ of *ejectione firmæ*.

This was the *factitious* or artificial stage in the development of the action of ejectment. It worked no injustice so long as the actual occupant was made defendant, or actually knew of the collusive action. But knaves, seeing the possibilities in the case, began to procure a second friendly party to come on and eject the artificial lessee. He was called the *casual ejector*, and when sued by the artificial lessee made default, and thus the title was adjudged to the plaintiff, although the actual occupant was entirely ignorant of the proceedings. The courts, however, soon remedied this by a rule requiring the actual occupant to have full notice of the proceedings, and giving him opportunity to come in and defend if he so desired.

The action remained in this factitious stage until the time of the Commonwealth (1649-1660), when, on account of the violence sometimes growing out of these artificial entries, Rolle, C. J., advanced the action into what may be called the *fictitious* stage. In this no lease is sealed, no entry or ouster is in fact made, the plaintiff lessee and the casual ejector, are both men of straw. Thus, A, the adverse claimant, delivers to B, the occupant, a declaration in ejectment, in which John Doe and Richard Roe, fictitious persons, are respectively plaintiff and defendant. In this declaration Doe states a fictitious demise of the lands in question to himself by the adverse claimant for a term of years, and complains of an ouster from them by Roe during its continuance. To this is annexed a notice by Roe, to the occupant, informing him of the proceedings, and advising him to apply to the court for permission to defend the action, as he, Roe, has no title and will make no defense. If the occupant does not so comply within a reasonable time, the court will, on proper proof of the service on him of the declaration and notice, give judgment against the casual ejector, Roe, and execution for the possession of the lands to the plaintiff lessee. But if the occupant apply, as he may be relied on to do, for leave to defend, then he is required to enter into what is called the consent-rule, by which he was compelled to admit a series of fictions, vizable, the *entry*, the *lease* and the *ouster*. Then, and not till then, was he permitted to come in and defend by having his name substituted

for that of the casual ejector. Then the cause regularly proceeded to trial.

Ejectment lies for the recovery of the possession of corporeal real property, in which the plaintiff's lessor has the legal interest, and a possessory right not barred by the statute of limitations. The plaintiff must recover upon the strength of his lessor's title; possession gives the defendant a title against every person who cannot show a better or sufficient title. So the plaintiff's lessor must have had the right of possession both at the time of leasing and at the time of bringing the action. If the lease expire during the trial, the successful plaintiff gets judgment with a perpetual stay of execution as to possession, so that he can recover mesne profits and costs. The defendant's possession at the time of leasing must be adverse or illegal. There must be an ouster, but a wrongful detention after lawful entry made will amount to an ouster in law. Where there has been no actual ouster, demand for possession must have been made and refused before bringing the action.

In the fictitious stage of ejectment, no substantial damages could be given for a merely imaginary ouster, so that after the plaintiff had established his title he was permitted to bring a certain action of trespass, an *action for mesne profits*. In this action the plaintiff complains of his ejection and loss of possession, states the time during which the defendant held the lands and took the profits, and prays judgment for the damages he has thereby sustained. The judgment in the

action of ejectment is conclusive evidence of the title at and since the alleged leasing, but not prior thereto, nor is it evidence of the defendant's occupancy except from the time of service upon him of the declaration of ejectment. Mesne profits are now usually recoverable in a count joined with the count in ejectment.

Sec. 1591. AT COMMON LAW THE PLEADER MUST NOT MAKE A MISTAKE IN CHOOSING FORM OF ACTION.—At the common law a mistake in the form of the action was fatal to the action. The courts considered form as an essential part of a legal proceeding, and would not allow the parties, even by agreement, to try a question, or to proceed with a cause in the wrong form of action. When the objection to the form is substantial and appears on the face of the pleadings, it may be taken by *demurrer*, by *motion in arrest of judgment*, or by *writ of error*. When it does not so appear, it can only be taken as a ground of *non-suit*. If for such a mistake the plaintiff fail in his action and judgment be given against him for that reason, and not upon the merits, this judgment is no bar to a new action for the same cause. Under the modern practice, such a mistake may be cured by amendment, and has no more serious consequences than delay, expense and mortification to the pleader.

Sec. 1592. EXTRAORDINARY ACTIONS.—There are a number of extraordinary actions, which were developed from time to time, to meet emer-

gencies, the use of which is permitted only when the ordinary forms of action are insufficient. These are:

1. *Mandamus*. 2. *Procedendo*. 3. *Prohibition*. 4. *Quo Warranto*. 5. *Information*. 6. *Habeas Corpus*. 7. *Certiorari*.

Sec. 1593. SAME SUBJECT—MANDAMUS.

—The writ of *mandamus* (we command), is a mandate issuing, in England, in the king's name from the court of King's Bench, and addressed to any person, corporation, or inferior court of judicature within the king's dominions, requiring to be done some particular *ministerial* act therein specified, which appertains to the duty of the party to whom the writ is addressed, and which the court of King's Bench has previously determined to be consonant to right and justice. This writ may be employed wherever the applicant has the right to have anything done of a ministerial character, and *has no other adequate specific means of* compelling its performance.

Sec. 1594. SAME SUBJECT—PROCEDENDO.

—The writ of *procedendo ad judicium* (for proceeding to judgment), issues in England, out of the court of Chancery, commanding an inferior court, which improperly delays judgment, to give it, but, of course, without specifying what judgment is to be given; since judgment, if erroneous, must be corrected by means of a writ of error or an appeal. Disobedience to a writ of *procedendo* may be punished as a contempt.

Sec. 1595. SAME SUBJECT—PROHIBITION.

—A writ of prohibition is a high prerogative writ, issuing properly out of the court of King's Bench, directed to the judge and parties to a suit in an inferior court, commanding them to *cease* from the prosecution thereof. It issues upon a suggestion of usurpation of jurisdiction by the lower court. If either the inferior judge or the parties proceeded after such writ of prohibition has issued it was a contempt of the court issuing the writ. When the question of jurisdiction in the lower court is doubtful, it is tried by a feigned contempt, and if it be decided in favor of the lower court, the higher court grants a writ of *consultation*, thereby returning the cause to the lower court to be there proceeded with according to law.

Sec. 1596. SAME SUBJECT—QUO WARRANTO.—The writ of *quo warranto* (by what authority), is in the nature of a writ of right for the king or state against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right. It lies also against him who holds after cause for forfeiture, or who holds unlawfully after expiration of term.

By virtue of statutes, an *information in the nature of quo warranto*, without a resort to the prerogative writ, may be brought, by leave of court, at the relation of any person desiring to prosecute the same (who is called the relator), against any person usurping, intruding into or unlawfully holding a franchise or office in any city, borough or town corporate. The

relator must have been in some way injured by the act complained of, though not necessarily specially injured. If the defendant be convicted, judgment of ouster may be given against him, and he may also be fined.

Sec. 1597. SAME SUBJECT—INFORMATION.—In England, an *information* on behalf of the Crown, filed in the Exchequer by the king's attorney general, is a method of suit for recovering money or chattels due to the king, or for obtaining satisfaction in damages for any personal wrong committed to the land or other possessions of the Crown. It is grounded merely upon the intimation of the attorney general, who "gives the court to understand and be informed of" the matter in question, whereupon the party informed against is put to his answer, and trial is had as between private subjects.

Sec. 1598. SAME SUBJECT—HABEAS CORPUS.—The writ of *habeas corpus ad subjiciendum* (you shall have the body for submission), is the great common law writ for inquiring into the lawfulness of the detention of any person. The person having in his custody the party restrained of his liberty must forthwith produce him before the court or judge issuing the writ. If, upon inquiry, such judge or court finds such imprisonment or restraint to be lawful, and under sufficient authority, no further inquiry can be made into the guilt or innocence of the accused, and he is remanded into custody, to be tried according to the ordinary forms of law; but if it be found that he has

been held without lawful authority, he must be released. This writ applies as well where the person detained is a private person, as where he is an officer.

Sec. 1599. SAME SUBJECT—CERTIORARI AND ERROR.—A writ of *certiorari* issues from a superior court to one of inferior jurisdiction, and commands such inferior court to certify to the former the *record* or proceedings in a particular case. Upon reception of the matter so certified, the superior court may proceed with the cause as though it had originated there; or it may simply inspect the record, where the proceeding is a summary one and not according to the common law, and determine whether or not there has been any material irregularity therein, which finding is certified back to the inferior court.

A Writ of Error is a method of procuring a review of a case as to the points of law involved therein, in a superior court, and will be discussed in a later chapter.

CHAPTER III.

OF THE JOINDER AND ELECTION OF ACTIONS.

Sec. 1600. COUNTS IN THE SAME FORM OF ACTION MAY BE JOINED.—For the purpose of lessening the burdens of litigation, certain actions or grounds of complaint are required to be joined, or disposed of in a single suit between the parties. The rule originally was, that counts in the same form of action might be joined, but that those in different forms of actions could not be joined. This rule was grounded in the fact that at that time every proceeding was begun by a separate original writ, and different actions required the corresponding writ, but if two or more grounds of complaint between the same parties fell under the same form of action so as to be set up in separate counts under the same action they not only might be joined, but were required to be joined. To this rule there was a limitation that counts which sounded in contract could not be joined with those sounding in tort. The limitation arose after the action on the case developed to include *assumpsit*, which sounded in contract, and *trover*, or case generally, which founded upon a tort.

Where the same form of action may be adopted for several distinct injuries, the plaintiff may generally proceed for all in one action, though the several rights

affected were derived from different titles. But a person cannot, in the same action, join a demand in his *own right*, and a demand in *autre droit* (in another right); nor can he join in the same action, an obligation which is personal, and one which involves the defendant in a representative capacity. However perfect in form each count may be, a misjoinder will be vulnerable to a general demurrer, to a motion in arrest of judgment, and to a writ of error. A demurrer for misjoinder of causes of action must be to the whole declaration. Under the later statutes of jeofails and amendments, a misjoinder may, before verdict, be cured by entering a *nolle prosequi* (unwilling to pursue), upon one or more counts which are objectionable; but after a general verdict for damages, and judgment entered thereon, the judgment would even now have to be arrested, as the court could not say what count or counts the jury assessed the damages.

Sec. 1601. ELECTION OF ACTIONS.—Sometimes the plaintiff has a choice of remedies for the same injury. Thus:

1. Where the title of the plaintiff is doubtful, he should, if possible, choose a remedy requiring proof of possession only; as *trespass*, for example, rather than *ejectment*; and *trespass* and *trover* rather than *assumpsit*.

2. In actions on contracts, the non-joinder of a proper co-plaintiff is ground for non-suit, while in a tort action it is open only to plea in abatement. Again,

in contract, the mis-joinder of defendants is a ground for non-suit, and the non-joinder of defendants may be pleaded in abatement; while in most torts, as in all which are considered joint and several, mis-joinder and non-joinder of defendants is immaterial. So when there is doubt as to who are proper parties, case, or other tort action, should, if possible, be used instead of assumpsit.

3. The plaintiff may have some demand which can be brought only in tort, or only in contract, and others which may be brought indifferently. These latter should, if possible, be so declared on as to be joinable with the first.

4. Sometimes to one form of action the defendant may plead a defense which he could not to another. Thus a discharge in bankruptcy, at common law, could be pleaded in bar of assumpsit for a contract obligation existing at the time of the discharge, but not in bar of a tort action. So set-off may be pleaded in assumpsit, but not in case. In cases of fraud, the statute of limitations may not begin to run until the fraud is discovered, while against the action in assumpsit it may begin to run at the time of the transaction. In all of these cases, and many others, the pleader will elect which action is the most advantageous for him to bring.

5. In some cases the plaintiff may choose between a local action and a transitory action. Differences in the ability of the courts, or the prejudices of the jurors, may lead him to prefer one of these to the other.

6. At common law when a tort-feasor died, the cause of action springing from the wrong, died with him. But if the tort is one that can be waived and action be brought in assumpsit, assumpsit may be brought against the representative of the deceased wrongdoer and satisfaction obtained.

7. Infants, lunatics, and the like, are unable to create contractual obligations against themselves, but they are liable for their torts. Hence, where possible, the action of tort would be preferable to assumpsit.

8. The nature and amount of damages recoverable in different forms of actions, may frequently make one form preferable to another. So in some jurisdictions stringent process exists against defendants in tort actions, which might be an advantage.

9. In debt, judgment by *nil dicet* (he says nothing), or generally, on default, is final; while in assumpsit and covenant it is only interlocutory, and compels delay and additional expense, before execution may be taken out.

Sec. 1602. EFFECT OF ELECTION—RIGHT TO CHANGE FORM OF ACTION.—Where a pleader has elected one form of action, he may nevertheless abandon it, and after duly discontinuing the action, he may resort to another. But where there are two inconsistent remedies, he is bound by his election, and cannot afterwards change his form of action.

CHAPTER IV.

OF THE FULL PROCEEDINGS IN AN ACTION AT LAW.

Sec. 1603. IN GENERAL. The full proceedings in an action at law from its commencement to its termination involved the following steps in succession: 1. The process. 2. The appearance of the defendant. 3. The pleadings. 4. The trial. 5. The judgment. 6. The execution. 7. Proceedings in error, where such were prosecuted. These will be considered in their order.

Sec. 1604. 1. MEANING OF PROCESS AND KINDS OF PROCESS.—Process is the means used by the judicial authorities to express their orders, and, if need be, to enforce a compliance of the same. The order is seldom made, but is generally implied.

Process is divided into three kinds, which are designated: 1. Original process. 2. The mesne process. 3. The final process.

Original process was the means of instituting the suit and compelling the defendant to come into court.

The mesne process, issued in interlocutory matters, that is, somewhere between the commencement and closing of the suit.

The final process is used in enforcing the court's judgment, as in the issuing of an execution.

Original process, at the early common law, was known as the "original writ."

Sec. 1605. OF THE ORIGINAL WRIT.—The original writ was the king's warrant for the judges to proceed to the trial of the cause. Because the court could not so proceed without the command of the king, the judges had no authority to consider a declaration varying from the original writ, or to allow amendments, or pardon mistakes, or permit a party to change his form of action, or recover more than the amount claimed in his writ. And so purely personal to the king were these original writs, that anciently, upon the demise of the king, all suits pending under writs granted by him were immediately discontinued, and the plaintiff was obliged to sue out a new writ, and begin anew. But as the application for the king's writs became more frequent, and their issue more a matter of course, the issuing of them was more and more entrusted to clerks and other subordinate officials in the chancery, who like most ministerial officers, found it easier to copy precedents than to adapt each writ to its proper purpose. As a result original writs began to fall into hard and fast classes, and were clung to with such persistency by the issuing officers, that the matter had to be remedied by the great statute of Westminster II, providing for the issuing of new writs in like cases.

The form of the original writ was a mandatory letter issuing out of the Chancery, under the great seal of the realm and in the king's name, directed to the sheriff of the county where the injury was alleged to have been committed, containing a summary state-

ment of the cause of complaint, and was in form either optional or peremptory; it was termed, according to the introductory words of the writ, either a *precipe* (command) or a *si te fecerit securum* (if he shall make you secure). Whenever the plaintiff demanded something certain, which the defendant might himself perform, the writ was properly a *precipe*; where nothing specific was demanded, but only unliquidated damages, to obtain which, the intervention of a court was required, as in writs of trespass or case, there a *si te fecerit securum* was issued. The optional form—the *precipe*—commands the defendant either himself to pay the debt to the plaintiff, or to show at a given time in the King's Court why he does not. The peremptory form, however, calls upon the defendant to appear immediately in court, provided the plaintiff give good security to prosecute his claim. This giving of security is now usually a matter of mere form, and frequently it is not even required as a matter of form. Where the plaintiff is a non-resident of the jurisdiction, however, he is frequently compelled to give security for costs. Both species of writs are *tested* (witnessed) in the king's own name, and issued under the Great Seal of the Realm.

The day upon which the defendant is ordered to appear in court, and on which the sheriff is ordered to bring in the writ and report what he has done in pursuance thereof, is called the *return day* of the writ. The year was divided into four terms in which the courts at Westminster sat for the despatch of business,

called Hilary Term, which began January 11th, and ended January 31st, of each year; Easter Term, beginning April 15th, and ending May 8th, of each year; Trinity Term, beginning May 22d, and ending June 12th of each year, and Michelmas Term, beginning November 2d, and ending November 25th of each year. On the first day in each term the court sat to take *essoins* (excuses) for such as did not appear in obedience to the writ, wherefore this is usually called the *Essoin* day of the term.*

A defendant cannot be damaged by the mere suing out against him of the original writ, and no action lies therefore. But if the original were process upon which the defendant could be compelled to come into court, an action would lie whenever the original was sued out without proper and sufficient cause.

The first step to *compel* the defendant's appearance was *judicial*, as contrasted with *original* process. Only the original writ issued from the Chancery, and under the Great Seal of the Realm, all subsequent process, whether original, mesne, or final, was *judicial* process, and issued out of the common law courts into which the original writ was made returnable, under the private seal of that court, and bore *teste* in the name of the Chief Justice of that court.

*In the United States jurisdiction is conferred upon the courts by the Constitution and statute laws creating them, and there is no occasion for an original or general writ. We have neither the original writ nor a substitute for it, as our *summons* is not to be confounded with the original writ, though doubtless it was designed to take the place of it.

Sec. 1606. OF THE VARIOUS KINDS OF ORIGINAL PROCESS.—Process at common law varied in stringency from the polite *summons*, to the decree of outlawry.

First was the *summons*, a warning to appear in court on the return day of the original writ; this being disobeyed, next came a writ of *attachment*, or *pone*, so called from the words of the writ, "*pone per vadium et salves plagios*" (put by gage and safe pledges), which compelled him to give *gage* (pledge of goods) or *safe pledge* (sureties) that he would appear. If he failed he thereby forfeited his *gage*, and his *safe pledges* were fined. Next there would be sued against the defendant the writ of *distringas* (you shall distrain), or *distress infinito*, under which he was gradually stripped of all his goods. Here process ended in the case of injuries without force; but for injuries with force the obdurate defendant's person was next attached, under a writ of *capias ad respondendum* (you shall take for answering). If the sheriff returns that the defendant *non est inventus* (is not found) in his bailiwick, then a *testatum capias*, issues to the sheriff of the county in which the defendant is supposed to be. The *testatum capias* recites the first writ of *capias*, and adds *testatum est* (it is testified) that the defendant *latitat et discurrit* (lurks and wanders about) in the bailiwick of this second sheriff, wherefore he is commanded to seize the body of the defendant and have him before the court. Where a defendant absconds and the plaintiff wishes to proceed

to outlawry against him, if the sheriff cannot find him upon the first writ of *capias*, there issues an *alias* writ of *capias*, and after that a *pluries* writ. If this is ineffectual, there issues a writ of *exigent* or *exigi facias* (you shall cause to be exacted) which requires the sheriff to cause the defendant to be proclaimed or exacted, in five county courts, successively, to surrender himself; if he does so the sheriff takes him as in a *capias*; if he does not appear, and is returned *quinto exactus* (the fifth time exacted) he shall then be outlawed by the coroners of the county.

The judgment of outlawry put a man out of the protection of the law, made him incapable of bringing a legal action, and forfeited all his goods and chattels to the king. If the outlaw appeared publicly, he could be arrested on a *capias utlagatam* (you shall take the outlaw) and committed to prison until the outlawry was reversed. It will be noticed that in all this tedious procedure there was no judgment by default, and the whole power of the court was directed to correcting the contumacy of the defendant, rather than to redressing the injury suffered by the plaintiff.

The court of King's Bench, because in contemplation of law the king sat in it, needed no original writ to give it cognizance of causes arising within the county in which it sat. Its authority entitled it to try causes when the injury alleged was forcible, and therefore akin to crimes. As no original writ was required, it developed process of its own whereby to bring to the notice of the defendant the pendency of a

cause against him. This was called a *bill of Middlesex*, or of *Kent*, etc., according to the county in which the court was sitting. This was in form a *capias*, and if the return was *non est inventus*, there issued a writ of *latitat*, directed to the sheriff of the county wherein the defendant was supposed to be.

It was a privilege of court, that an officer or prisoner therein, might be sued without original writ, that is, the defendant already being in the custody of the court, no original writ was necessary to give the court jurisdiction over him. Out of this fact grew the practice of King's Bench in taking jurisdiction of all civil causes involving personal actions. Thus, a complaint of trespass, *quare clausum fregit*, would be entered in the records of the court, then a bill of Middlesex or other writ would be issued, whereby the defendant was brought into the custody of the court; whereupon the real complaint was made against him, and the complaint of trespass thereafter ignored.

The court of Exchequer extended its jurisdiction in a similar way. The great writ in this court was the *quo minus*. The plaintiff suggests that he is the king's debtor, and that the defendant has done him the wrong complained of, *quo minus sufficiens existit* (by which he is the less able) to pay the king his rent or debt. Upon this writ the defendant may be arrested as upon a *capias*, and once within the custody of the court, he may be proceeded against for any personal cause of action.

Sec. 1607. IN THE UNITED STATES THE

PROCESS USED TO INSTITUTE A SUIT IS A SUMMONS.—In the United States, generally, a summons is the form of process used to institute a suit. It is generally attested by the chief justice, or presiding judge of the court from which it issues, and is returnable to the court from which it issues. It is addressed to the sheriff of the county, is to be returned on a day certain therein named, and in general takes the place of the original writ of the common law.

A *capias ad respondendum*, authorizing the arrest of the defendant's person, is of very limited use in this country as original process. It is allowed in some jurisdictions by express statutory authority in cases of fraud, breach of trust, or other gross wrongdoing.

An attachment is similarly authorized against the property of absconding debtors, non-residents and other classes of persons specifically designated in the statutes providing for this summary process.

Sec. 1608. THE APPEARANCE OF THE DEFENDANT.—The appearance of the defendant is his submission to the jurisdiction of the court. In pleas to the jurisdiction, it must be made by the defendant in person. In all others it may be so made or it may be made by attorney, or if he has been arrested, his giving bail is an *appearance*. The appearance is usually shown upon the record by the words "and the said A. B. (the defendant) by E. F., his attorney, *venit* (comes), etc." This word, *venit*, is the technical word expressing appearance.

The appearance is either *general* or *special*. If spe-

cial, the entry must so state, and must show the purpose, as to object to the jurisdiction of the court, to want of service of process, to misnomer, or other formal defects. A general appearance waives all of these defects, which must be taken advantage of by entering a special appearance only, as for the purpose of objecting to the jurisdiction.

Sec. 1609. THE PLEADINGS—THEIR PURPOSE.—The pleadings are the formal allegations of fact whereon the parties rely to support the claim of injury and the defense thereto. They were made orally in early times, but have for many centuries now been required to be in writing. The facts alleged in the pleadings must be material, that is, they must constitute the minor premise of a syllogism, of which the major premise is purely a proposition of law, the latter not stated because it is presumed to be at all times in the mind of the court. The conclusion of the syllogism is the proposition which the party desires the court to lay down as its judgment.

When the pleadings were oral, as they proceeded they were minuted down by the chief clerk or prothonotary, and, together with the entries from time to time made concerning the cause, constituted the record of the cause. This record, when complete, was preserved as a perpetual, intrinsic and exclusively admissible testimony of all the judicial transactions which it comprised. As it was made by a clerk, one not a party, it was entered as a narrative in the third person. Later the parties, when they began for convenience to write

their pleadings, came in and wrote them on the clerk's roll, and they thus to this day are in the third person.

Sec. 1610. THE COURT DIRECTED THE PLEADINGS SO AS TO ARRIVE AT AN ISSUE OF FACT OR LAW AFFIRMED ON THE ONE SIDE AND DENIED ON THE OTHER.—The court's duty in this connection was to direct the pleadings in such a manner that the parties might as speedily as possible arrive at a proposition, either of fact or law, material to the cause, which was specifically affirmed on one side and denied on the other. When this stage was reached the parties were said to be *at issue* (*ad exitum*, that is, at the end of their pleading), and the proposition evolved was called "the issue." It was according to the nature of the proposition, either an issue of fact, or an issue of law. If the latter, the judges themselves decided the matter; if the former, it was referred to which ever one of the various methods of trial then practiced, as the court thought applicable, or it was, when proper, by mutual agreement of the parties, referred to a trial by jury.

An adjournment of the proceedings from day to day by an order of the court, or from term to term, was called a "continuance," and was minuted on the record. If any interval took place without such an adjournment, duly obtained and entered of record, the break thus occasioned was called a "discontinuance," and the cause was considered as out of court by the interruption, and was not allowed to be proceeded with afterwards.

Sec. 1611. THE FIRST PLEADING IS CALLED THE DECLARATION.—The “declaration” is the first pleading in a cause. It is a formal statement on the part of the plaintiff of the facts constituting his cause of action, or grounds of complaint. The declaration must state the facts constituting the action more fully than does the original writ, but still in strict conformity with the tenor of that instrument. The declaration must state the facts constituting the cause with such precision, clearness and certainty, including certainty of time and place, that the defendant knowing what he is called upon to answer, may be able to plead a direct and unequivocal plea; the jury may be able to give a complete verdict upon the issue, and the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises.

The first pleading in an action begun by bill of Middlesex, etc., or by *quo minus* was called a “bill.” It was, nevertheless, exactly equivalent to a declaration, differing from it only in some formal words at the commencement and conclusion.

Sec. 1612. CONCLUSION OF THE DECLARATION.—The declaration formerly concluded with the words: “And therefore he brings suit and good proof.” The *suit* was the plaintiff’s band of followers ready to verify his assertions. Bringing them was called the “production of suit.” Later the mere assertion became called by that name. In those days a party’s unsupported word was worthless. If no suit

is produced, the defendant, upon raising that objection, is excused from further answering. So the defendant might demand examination of the suit, in which case he abandoned every other form of defense and staked the case upon the testimony of the suit. If compelled to answer the defendant "comes and defends (that is, denied) the wrong and injury when, etc." Having denied the plaintiff's allegations, the defendant must offer to make good his denial "when and where he ought as the court shall consider," whereupon the court awarded the mode of trial.

Sec. 1613. IF THE DECLARATION BE INSUFFICIENT IN LAW THE DEFENDANT MAY DEMUR.—If the matter of the plaintiff's declaration be insufficient in law, then the defendant may *demur*; that is, rest or pause, and takes the court's judgment whether or not sufficient has been alleged to make it needful for him to answer. A demurrer is therefore not a plea, but is rather an excuse for not pleading. The defect apparent upon the face of the declaration may be one of substance, in that no legal cause of action has been stated, or it may be one of form merely, in that the declaration is not framed according to the rules of pleading. A demurrer for the former defect is called a *general demurrer*, and for the latter, a *special demurrer*.

Sec. 1614. THE PLEA OF THE DEFENDANT.—If the defendant does not demur, he must answer the declaration by counter averments of fact.

In so doing he is said to *plead*, and his answer so made is called his *plea*. These pleas are either *Dilatory* or *Peremptory*; and dilatory pleas are subdivided into: (i) Pleas to the jurisdiction of the court. (ii) Pleas in suspension of the action. (iii) Pleas in Abatement of the writ. The peremptory pleas are always in bar of the action.

Sec. 1615. DILATORY PLEAS.—In a plea to the jurisdiction of the court, the defendant excepts to the right of the court to assume jurisdiction of the subject matter of the action against him.

When the plea is to the suspension of the action, it alleges some fact constituting an objection to the proceeding in the suit at that time by the court, and prays that the pleading may be suspended until that objection is removed. Thus non-age of the defendant, when sued upon an obligation of his ancestor, is such an objection.

A plea in abatement of the writ is one which shows some ground for abating or quashing the original writ, and it concludes with a prayer that this may be done. Pleas in abatement are addressed: 1. To the person of the plaintiff; as that he is an alien enemy, or an outlaw, and the like. 2. To the person of the defendant; as that he is a bankrupt, or that she is a married woman, and the like. 3. To the count or declaration; as that it varies from the original writ, or omits to make a joint-contractor party defendant, and the like. 4. To the original writ; as that its parts are repugnant, or that it varies from the record or

specialty sued on, or that it misnames the parties, or one of them, or that two parties sued as husband and wife are not in fact such, and the like.

The effect of all pleas in abatement, if successful, is to defeat the particular action only, but not to destroy or defeat the right of action. Upon removal of the objection, the plaintiff may again sue. Statutes usually require that all dilatory pleas be verified by affidavit, or, at least, that some probable matter be shown to the court to convince it of the truth of the dilatory plea.

Sec. 1616. PEREMPTORY PLEAS.—A peremptory plea, or plea in bar of the action, shows some ground for barring or defeating the alleged cause of action. Its prayer is that the plaintiff may be barred from further pursuing his said action. The plea may either *traverse* (deny) the matter of the declaration, or it may *confess* (admit its allegations of fact) and *avoid it*, by showing other facts which excuse the defendant, and deprive his alleged acts of wrongfulness. Pleas in bar are thus divided into: 1. Pleas by way of confession and avoidance. 2. Pleas by way of traverse.

Sec. 1617. PLEAS BY WAY OF TRAVERSE.—A *traverse* at once brings the cause to an issue, and so concludes with the offer of a mode of proving the denial. This is called “tendering issue,” and the issue so tendered is called an “issue in fact.” A demurrer, as we have already seen, always brings an issue, but

it is one of law and not of fact, and the law issues are referred to the court for its decision, there being no choice of modes of determining it, so that the tender of issue in a demurrer is perfectly formal, being made as a matter of course and accepted as a matter of course. The formula of the defendant's acceptance is called a "joinder in demurrer." But to the tender of an issue of fact, the plaintiff may demur, either to the sufficiency of the facts alleged, or to the manner of alleging them, or to the mode of trial proposed. If he does accept the issue of fact, an acceptance is expressed by a formula called a "joinder in issue," or a *similiter* (likewise), because the tender of issue ran, "and of this the said C. D. puts himself upon the country, etc.," and the joinder by the other party was, "and the said A. B. does likewise."

Sec. 1618. OTHER PLEADINGS TO ARRIVE AT AN ISSUE.—With either form of joinder above mentioned the parties are "at issue," and the pleadings are at an end. But instead of traversing the declaration, the defendant may plead a *dilatory plea*, or a plea by way of confession and avoidance. In either case, the plaintiff may then demur as before or he may plead by way of traverse, or by confession and avoidance. Such pleading on the plaintiff's part is called the "replication."

After the replication, issue may be joined as before, or the defendant may demur or plead further in any of the ways above described. If he so pleads his plea is called his "rejoinder." And so on the pleadings

may continue, the alternate pleadings being, *declaration, plea; replication, rejoinder; sur-rejoinder, rebutter; sur-rebutter*, etc.

If at any stage a demurrer is interposed, it imports no new facts, and in effect admits all allegations of fact well pleaded. New pleadings may bring in new facts and extraneous matters, or deny prior allegations, but each pleading is taken to admit all prior allegations of fact well pleaded, unless expressly denied in the new pleading.

Sec. 1619. OTHER PLEADINGS OF OCCASIONAL OCCURRENCE.—There are certain pleas and incidents of only occasional occurrence, that diversify the ordinary course of pleadings.

Sometimes a matter of defense arises after a continuance and before the time to which the cause was continued. This the defendant pleads in a plea *puis darreign continuance* (after the last continuance). Such plea is always pleaded by way of substitution for the former plea, on which no proceeding is afterwards had. It may be either in bar, or in abatement, and is followed with a traverse or plea as other pleas.

In most real actions the tenant is allowed to *demand* a view of the land which the demandant claims in order to see if it is the land which the tenant claims and occupies. This being done the demandant (plaintiff) sues out a writ instructing the sheriff to cause the tenant to have a view of the land. The demandant goes along and points out the land with its metes and bounds. On the sheriff's return of the writ, the de-

mandant is required to plead *de novo* (*anew*), and the pleadings proceed to issue.

When lands have been warranted to a tenant, and another person brings a real action against him in respect thereof, he, by a *voucher to warranty*, calls the warrantor into court to defend the title for him. When the warrantor does not voluntarily appear, there issues a summons *ad warrantizandum*. When he appears, voluntarily or otherwise, and offers to warrant the land to the tenant, it is called "entering into a warranty", after which the warrantor is considered as the tenant in the action, and the demandant then pleads *de novo*, declaring or counting against the warrantor, or *voucher*, as he is now called.

Where either party alleges any deed, he is generally obliged to make *profert* (proffer) of it, after which the other party may *crave oyer* (ask to hear it). Upon this demand being made the profferer usually read the deed aloud. Later, his attorney merely furnished a copy. Oyer is demandable in all classes of action, but only where *profert* is made, and only in that term of court at which *profert* is made. Whatever appears in the deed when so read is considered as having been originally pleaded by the profferer, and is repugnant to anything else in his pleading, the other party's proper course is to demur, and to object by plea.

Anciently when a party found himself unprepared to respond immediately to his adversary's pleading, he prayed the court to grant him further time. Such delay, when granted, was called an "imparlance", be-

cause it was supposed that in this time the parties might *imparl* (talk together) and come to some amicable settlement of their controversy.

Usually the opposite party had the right to oppose the prayer for any of the above described incidents. And this he might do by demurrer if the objection appeared on the face of the pleading objected to; otherwise, it was done by counter-plea.

Sec. 1620. OF THE PAPER-BOOK, OR DEMURRER-BOOK.—The cause being at issue, the next step is to make a transcript of the whole pleadings that have been filed or delivered between the parties. This transcript, when the issue joined is an issue in law, is called the “demurrer-book”; when an issue of fact, the transcript in some cases is called “the issue”, in others the “paper-book.” Besides the pleadings, it contains entries of appearances, continuances, etc. When made up it is delivered to the defendant’s attorney, who, if it contains what he admits to be a correct transcript, returns it unaltered; but if it varies from the pleadings that were filed or delivered, he applies to the court to have it set right.

The party finding that he has made any mistake, or unwise move, should apply before judgment for leave to amend. This, until judgment is signed, is granted of course, but upon proper and reasonable terms, including the payment of the costs of application, and sometimes the whole costs of suit up to that time. Statutes in modern times are liberal in their directions concerning amendments and are liberally administered by the

courts, but always with due regard to the rights of the opposite party.

The pleadings and issue being adjusted and transcribed upon the demurrer-book, issue, or paper-book, the record is next drawn up on parchment roll. This proceeding is called entering the issue. And the roll on which the entry has been made is called the "issue roll." It contains an entry of the term in which the transcript book is entitled, the warrant of attorney, the pleadings, continuances, etc., as in the paper-book, and when completed is filed in the proper office of the court.

When, upon a demurrer, the issue has been arrived at and the proper entries made of record, the next step is to "move for a *concilium*, that is, move to have a day appointed on which the court will have the counsel argue the demurrer. Such day being set, the cause is "entered for argument", which is had *viva voce*.

Sec. 1621. OF THE VARIOUS KINDS OF TRIAL.—The proceedings by which the issue of fact arrived at in the pleadings is examined, and the decision arrived at, is called "the trial." Various methods of trial were anciently in use; these were designated as follows: 1. Trial by witnesses. 2. The trial by oath of the party, with or without fellow-swearers (compurgators). 3. The trial by battle or ordeal, either of fire or water, or combat.* 4. Trial by the record, as where

*Trial by Ordeal, was the most ancient species of trial, it was also called *judicium Dei* (the judgment of God) and was based generally on the notion that God would interfere

the issue was *nul tiel record*, the court could award a trial by 'inspection and examination of the record' in question, which is the only proper mode of trial of such a question. The party alleging the existence of a record is bound to produce it in court at the day set.** 5. Trial by jury. The trial by jury was introduced into England by the Normans, and came to supersede all other methods of trial in course of time.

Sec. 1622. THE TRIAL BY JURY.—In the early history of trial by jury, the jurors were witnesses acquainted with some or all of the facts in controversy between the parties litigant; they came together and compared their respective impressions of the facts and arrived at a collective judgment as to the facts in issue. Sometimes not being sufficiently advised as to what constituted the facts, it became necessary to examine witnesses, and thus the jury system gradually came to what it is to-day,—a body of men appointed to hear the evidence and determine the true facts and, under the instruction of the court, the legal effect thereof.

miraculously to vindicate the guiltless. The fire ordeal was performed either by taking up in the hand, unhurt, a piece of red-hot iron; or else by walking barefoot and blindfold over nine red-hot plow shares, laid lengthwise at unequal distances. If the party escaped being hurt, he was adjudged innocent; otherwise he was condemned as guilty. Trial by ordeal, whether of fire, hot water, cold water or wager of battle, was abolished as the people became sufficiently civilized to recognize the ridiculousness of such a procedure as a test of guilt or innocence.

**There were also a few miscellaneous methods of proving particular facts, as by the certificate of a bishop, inspection of a party to determine infamy, etc.

When the parties have actually "put themselves upon the country", that is, in legal terminology, have asked for a trial by jury, a jury trial is awarded and the writ of *venire facias* (you shall cause to come) issues, addressed to the sheriff of the county of the *venue*,—that is, the county where the facts are alleged to have occurred, and commanding him to summon a jury from the body of his county.

The *venire facias* directs the sheriff to have the jury before the superior court at Westminster at the time stated in the writ, *nisi prius* (unless before) the justices of the superior court came into his county to try the cause there upon their semi-annual circuit (which was always done), in which case he should have the jury in the *assize* town of his own county, where the justices in Eyre came. When the trial is to be so had, with the *venire facias* was sued out another writ, called in the King's Bench, the *distringas*, and in the Common Bench, the *habeas corpus*. The next step was to make up at the proper offices the record of *nisi prius*, which is a transcription from the issue roll, and contains a copy of the pleadings and the issue. The *nisi prius* record is then delivered to the judges of *assize* and *nisi prius* and serves for their guidance as to the issue to be tried on the circuit.

As a rule the trial by jury was usually held at *nisi prius*, yet in causes of great significance and difficulty the inquest by jury was allowed to be taken before the four judges in the superior court, before whom the pleadings took place, as in the ancient practice. The

proceeding is then technically said to be a "trial at bar", as distinguished from a trial at *nisi prius*.

Sec. 1623. SUBMITTING THE FACTS TO THE JURY.—At the trial by jury, the proceedings are directed by the judge or judges; it being the function of the judge to pass on the admissibility of any evidence that may be offered by one party and objected to by the other as irrelevant, or incompetent, the judge is also to instruct the jury with regard to the duties it is to perform. After hearing the evidence, the addresses of counsel, and the charge of the judge, and his instructions in regard to the construction of any instrument of writing that may have been introduced in evidence, the jury retires and having deliberated on the case announce its *verdict*, which the law requires to be unanimously given. The verdict is usually in general terms as "for the defendant", "for the plaintiff", and in the later case finding at the same time, where damages are claimed, the amount to which the plaintiff is entitled.

The rules governing the jury in the arriving at its verdict are, briefly, these: 1. To take no matter into consideration but the question at issue. 2. To give its verdict for the party who, upon the proof, appears to have succeeded in establishing his side of the issue. 3. Consider the burden of proof to be upon him who has the affirmative of the issue; and if he does sustain his contention, in civil cases by a preponderance of the evidence, and in criminal cases, by proof beyond a rea-

sonable doubt, the verdict should be given to him who has the negative.

Sec. 1624. OF A VARIANCE.—A disagreement upon a material point between the allegations and the proof at trial, is called a “variance”, and is fatal to the party on whom rested the burden of sustaining that particular allegation. It is sufficient, however, that the issue in the pleadings be substantially proved.

Sec. 1625. ENTERING THE VERDICT OF THE JURY.—The verdict, when given, is formally drawn up and entered on the back of the record of *nisi prius*. Such entry is called the *postea*, from the language, “afterwards came the jury, etc.”

Sec. 1626. OF EXCEPTIONS, AND THE BILL OF EXCEPTIONS.—If either party is dissatisfied with the ruling of the judge on points of law, as the competency of witnesses, or the admissibility of testimony, and wishing to have such ruling reviewed by a superior court, he may, in the superior court from which the judge came, move for a “new trial”, but as the trial judge is a member of that court, he may desire to have it reviewed in another court, in which case he must get his objection into the record. This he does by objecting, or, as the phrase is, excepting to the ruling of the judge at the time it is made. Within a convenient time thereafter, which time is fixed by the rules of the court, he tenders to the judge a “bill of exceptions”, that is, a statement in writing, of the rulings made by the judge, and his objections thereto; to which statement, if truly made, the judge is bound to

set his seal in confirmation of its accuracy. The cause, after exception taken, proceeds as though there had been no objection made, but later, when the whole record is taken to the appellate court by "writ of error", the bill of exceptions is treated as part of the record, and the points of law raised in it are decided in the appellate court, which may be the same as that of the lower court or it may be according to the contention of the party prosecuting the writ of error.

Sec. 1627. A PARTY MAY DEMUR TO THE EVIDENCE.—A party disputing the legal effect of any evidence offered, may "demur to the evidence". By so doing he says in effect that admitting all the properly received evidence offered by the other side to be true, it is, nevertheless, insufficient to sustain the opposing side of the issue, and because it is thus insufficient, he does not desire to introduce any evidence. Upon joinder in this demurrer, the jury is generally discharged from giving any verdict; and the demurrer, being entered of record, is afterwards argued and decided in court *in banc*, and the judgment there given upon it may be ultimately reviewed before a court of error, the same as if it had been tried on the facts and bill of exception taken.

A more convenient course for determining the legal effect of the evidence, is to obtain from the jury a "special verdict"; that is, the jury may be asked, instead of finding simply the affirmative or negative of the issue, to find a special verdict as to all the facts of the case as disclosed upon the evidence before them.

The entry of the verdict, *postea*, in practice is drawn up by professional hands, and the jury merely declares its opinion as to any facts remaining in contention, and the special verdict is drawn up and settled under the correction of the judge, by the counsel of both sides, according to the findings of the jury so far as delivered, and as to other facts according to what it is agreed they ought to find from the evidence submitted. This special verdict along with the whole proceedings of the trial is entered of record, and argued before the court *in banc*, and there decided as in case of a demurrer to the evidence.

The dissatisfied party may afterwards resort to a court of error. They cannot be compelled to give a special verdict. A special verdict, when given differs from a demurrer to the evidence, in that the former ascertains the facts proved, the latter recites all evidence adduced; in favor of the special verdict no inferences as to matters of fact are allowable, whilst in the case of the demurrer, the court must draw from the evidence demurred to, all inferences that a jury might reasonably draw.

When it is not desired to make out a writ of error, but merely to obtain the decision of the court *in banc*, the shorter and cheaper course is to take a general verdict, subject, as the phrase goes, to "a special case", that is, to a written statement of all the facts of the case, drawn up for the opinion of the court *in banc*, by the counsel and attorneys on either side, under the

correction of the judge at *nisi prius*, according to the principal of a special verdict.

Such special case is not entered on the record. A general verdict subject to a special case, is sometimes called "a case agreed". The "case agreed" may occur at any time after suit is instituted; the "special verdict" only after issue joined. Like the special verdict, the case agreed admits of no inferences of fact, but is strictly construed.

Sec. 1628. OF THE JUDGMENT.—In case of trial at *Nisi Prius*, the return day of the last jury always falls upon a day in term subsequent to the trial at *nisi prius*, and forms the next continuance of the cause. On this day, or in case of trial at bar, immediately after such trial, *judgment* is ready to be rendered, but in practice a period of four days elapses before judgment can be actually obtained. During these four days the unsuccessful party, in order to avoid the effect of the verdict, may: 1. Move the court to grant a "new trial". 2. Move the court to "arrest the judgment." 3. Move the court to give judgment "*non obstante veredicto*" (despite the verdict), if he was the plaintiff. 4. Move the court to "award a repleader." 5. Move the court to "award a *venire facias de novo*."

Sec. 1629. HOW A MOTION FOR A NEW TRIAL IS SUPPORTED.—A motion for a new trial may be supported on one or more of these grounds: 1. The judge's misdirection to the jury. 2. The erroneous admission or rejection of evidence. 3. The verdict of

the jury being contrary to the evidence. 4. The verdict based on evidence insufficient in law. 5. The verdict clearly contrary to the weight of evidence. 6. The discovery of new and material evidence, subsequent to the trial, which the party could not have obtained before the trial by the exercise of due diligence. 7. Excessive, or insufficient damages. 8. Misconduct of the jury, in any respect.

In case any of the above grounds are properly shown to have existed, on motion duly made, it is the duty of the court, in the exercise of its discretion, and with a regard to all the circumstances in the case, to grant a new trial. If this is done, a new jury process subsequently issues, and the cause comes on to be tried *de novo*.

Sec. 1630. GROUNDS UPON WHICH A MOTION IN ARREST OF JUDGMENT MAY BE MADE.—A motion in arrest of judgment may be made upon the ground of any error, apparent on the face of the record. But such error must be substantial. Merely formal errors may be corrected by amendment of the record, such corrections being authorized by the statutes of *jeofails* and amendments.

Sec. 1631. WHEN THE MOTION FOR VERDICT *non obstante* SHOULD BE MADE.—A motion for judgment *non obstante veredicto* is made where, after a pleading by the defendant in confession and avoidance, and issue joined thereof, and verdict found for defendant, the plaintiff on examining the whole record conceives that such plea in avoidance was

“bad in substance” and should have been demurred to. The verdict merely finds the plea true, and if it were bad in substance, of course it cannot support a judgment, while the defendant by his confession of the material allegations of the plaintiff, has, the plaintiff conceives, really acknowledged his right to recover. It is expedient for the plaintiff to so move even though the verdict be in his own favor, if it seems, in such a case as above described that the judgment taken upon the verdict would be erroneous, for then the only safe course would be to take it as by confession.

Sec. 1632. WHEN A MOTION FOR A REPLEADER SHOULD BE MADE.—A motion for a repleader is made where the unsuccessful party, on examination of the pleadings, conceives that the issue joined was immaterial, and that the defect in the pleadings cannot be cured by a judgment *non obstante veredicto* as above described. A motion for a judgment *non obstante* could be made only by the plaintiff, but the motion for a repleader could be made by either party.

A motion for judgment *non obstante veredicto* is always upon the merits of the action, while a motion for repleader is upon a formal defect in the pleadings.

Sec. 1633. WHEN A *venire facias de novo* WILL BE AWARDED.—A *venire facias de novo* will be awarded when, by reason of some irregularity or defect in the proceedings on the first *venire*, or on the trial, the proper effect of that writ has been frustrated, or the verdict has become void in law, as where the jury

has been improperly chosen, or has given an uncertain or ambiguous or defective verdict. Hence the objection raised by a motion for a *venire facias de novo* is to the practical course of the proceedings rather than on the merits.

Sec. 1634. OF THE FORM OF THE JUDGMENT.—When the issues have been decided in favor of one or the other of the litigants, and all motions after trial have been disposed of, nothing further remains than to award the judicial consequences which the law attaches to such decision, which award is called the *judgment*.

When the judgment is for the plaintiff upon an issue in law arising upon a dilatory plea, the judgment is that the defendant *respondeat ouster* (answer over). Upon all other issues in law, and upon all issues of fact the judgment is that the plaintiff *quod recuperet* (do recover). A judgment *quod recuperet* is of two kinds: interlocutory, and final. The final judgment is rendered where the trial, in its course, has shown the amount of damages which the plaintiff ought to recover, or has shown his title to the property, where that is the issue. The interlocutory judgment is given where he sues for damages, and the trial, as in the case of an issue in law, does not disclose the amount of damages to which he is entitled, such amount is then to be ascertained by a subsequent inquest.

When judgment is for the defendant upon an issue arising upon a dilatory plea in abatement, it is that the writ be quashed (*quod breve cassetur*); if in sus-

pension only, it is that "the pleading remain without day until, etc." If the issue arise upon a declaration or peremptory plea, the judgment generally is that the plaintiff take nothing by his writ (*nil capiat per breve*).

In judgments by default, confession, etc., when the defendant appears, but does not plead or follow up his plea until issue joined, judgment of *nil dicit* (he says nothing) is given against him; if instead of a plea his attorney says he is not informed of any answer to be given, judgment of *non sum informatus* (I am not informed) is given against him. If before pleading he confess the action, or after pleading he confesses the action and withdraws his plea, the judgment against him is called "judgment by confession, etc.". If the plaintiff fail to make the next move in pleading when he ought, judgment of *non pros.* (*non prosequitur*—he does not pursue) is given against him. If he says he will not further pursue, or that he withdraws his suit, or prays that his writ or bill may be quashed that he may sue out a better one, the judgment against him is *nolle prosequi*, *retraxit*, or *cassetur breve*, respectively.

Judgment of nonsuit goes against the plaintiff upon a trial by jury, if, upon being demanded at the instance of the defendant to be present when the jury gives its verdict, he fails to do so. So judgment, as in the case of non-suit, is given where the plaintiff neglects to bring the cause on to be tried in due time.

The proceedings, including the judgment, subsequent to the award of venire are entered with the con-

tinuances, etc., on the issue roll, and in continuation thereof. This is thenceforth called the "judgment roll", and is deposited and filed of record in the treasury of the court.

Sec. 1635. OF THE WRIT OF EXECUTION.—For the purpose of putting in force the judgment, the successful party sues out such writ of "execution" as he conceives himself entitled to (taking upon himself all risk of error therein), the writ so issued is addressed to the sheriff and commands him to give the plaintiff possession of the lands, if that is the case, or to enforce the delivery of the chattels in question, or to levy the debt and damages and costs recovered by plaintiff, or to levy for the defendant his costs.

Sec. 1636. OF THE WRIT OF ERROR.—A writ of error is an original writ directed to the judges of the court in which judgment was given, and commanding them in some cases, themselves to examine the record, and, in others, to send it to a court of appellate jurisdiction, there to be examined in order that some error alleged to be therein may be corrected. The first form is a writ of error *coram nobis* or *vobis*. Errors of fact are the only ones corrected by this form, and these errors of fact are technical errors in the proceedings, such as allowing an infant to appear by attorney instead of by guardian; allowing a *feme covert* to be sued without having her husband joined, etc.

The second form of writs of error does not direct the judges to re-examine the record, but to send it to the appellate court. Judges are, in contemplation of

law, bound, before giving judgment, to examine the whole record, and then to adjudge either for the plaintiff or defendant according as the legal right may on the whole appear, without regard to the issue in law or fact that may have been raised and decided between the parties. Error in so doing, is thus apparent upon the face of the record, and it is such error that is corrected in the appellate court.

CHAPTER V.

OF THE RULES OF PLEADING.

Sec. 1637. THE OBJECTS OF PLEADING.—

In order that the business before the courts may be performed with convenience and dispatch it is necessary that the point or points material to the rights in controversy between the parties be arrived at as precisely as possible by the litigants before the matter is presented to the court for decision. The court maintained at public expense cannot with propriety be called upon by the parties to do this work except in so far as from the nature of things it is impossible that they should do it for themselves.

The early judges thought that it was sufficient for the attainment of substantial justice if the parties were permitted to stake their claims upon a single issue, it being left to them to determine what this issue should be. Singleness of issue is also to a considerable extent necessary in jury trials, to avoid confusing the frequently untrained minds of the jurors. The same considerations also requires that the issue be clear and unambiguous, and also that it be *certain*. It being said by Mr. Stephen, that the chief objects of pleading are "that the parties be brought to issue, and that the issue so produced be *material*, *single*, and *certain* in its quality. Also the avoidance of *obscurity*, and *confusion*—

of *prolixity* and *delay*.”* The rules of pleading are those developed by the experience of the pleaders for the sake of achieving these objects. These rules have been thus classified by Mr. Stephen:

I. Of rules which tend simply *to the production of an issue*.

II. Of rules which tend to secure the *materiality* of an issue.

III. Of rules which tend to produce *singleness* or unity in the issue.

IV. Of rules which tend to produce *certainity* or particularity in the issue.

V. Of rules which tend to prevent *obscurity* and *confusion* in pleading.

VI. Of rules which tend to prevent *prolixity* and *delay* in pleading.

VII. Of certain *miscellaneous* rules.**

Sec. 1638. RULE I—THE PRODUCTION OF AN ISSUE.—*After the declaration, the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance.*

The exceptions to this rule are: where a *dilatory* plea is interposed; pleadings in *estoppel*; and where a *new assignment* is necessary.

The fact that the party *must demur* or *plead*, gives the rule two branches for consideration: the demurrer, and the *pleadings*.

*Stephen on Pleading, 135.

**Stephen on Pleading, 136.

Sec. 1639. OF DEMURRERS, THEIR NATURE AND PROPERTIES.—It is never proper to demur except for *defects apparent upon the face* of the pleading demurred to, and it is never improper, though sometimes unwise, to demur for such a defect.

Demurrers in *nature* and *form* are of two classes: *general* and *special*. A *general* demurrer excepts in *general* terms to the sufficiency of the pleading demurred to, but is proper only when the insufficiency is on a matter of substance. A *special* demurrer is necessary where the objection turns on a matter of form only, and it must show the particular ground of objection. It is to be noted, however, that under a special demurrer, the party may on argument not only take advantage of the particular faults which his demurrer specifies, but also all such objections in substance as do not require, under the statutes to be particularly set down. The safer course is therefore to demur specially, but a special demurrer is open to the objection that it compels the party demurring to particularize the defects, and thus inform the other party of them, earlier than he otherwise would have to do.

Sec. 1640. EFFECT OF A DEMURRER.—The first effect of a demurrer is that it admits all such matters of *fact* as are *sufficiently* pleaded in the pleading demurred to, that is, it is an admission, for the purposes of the demurrer, that the facts alleged are true. In considering the demurrer the court will consider the whole record and give judgment to the party who, on the whole, appears to be lawfully entitled to it. The

exceptions to this, are: 1. That if the plaintiff demur to the plea in abatement, and the court decide against the plea, the judgment is *respondeat ouster*, without regard to any defect in the declaration. 2. Though upon the whole record the right may appear to be with the plaintiff, yet the court will not adjudge in favor of such right unless the plaintiff have himself put his action and right upon that ground.

The court in examining the whole record to determine the right, will only consider matters of substance, and will overlook defects of mere form, unless raised upon special demurrer.

Sec. 1641. OF THE EFFECT OF PLEADING OVER WITHOUT DEMURRER.—The effects of pleading over without demurrer, where demurrer might be made, are that: 1. Faults in the pleading are in some cases *aided*, that is cured, by pleading over, and with respect to all objections of *form* the rule is, “if a man pleads over he shall never take advantage of any slip committed in the pleading of the other side which he could not take advantage of upon a *general* demurrer.”** Faults in the pleading are, in some cases, aided by verdict. “Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts as defectively or imperfectly stated or omitted and with-

**2 Salk. 519.

out which it is not to be presumed either that the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict."* But if a necessary allegation be altogether omitted in the pleading, or if the pleading contain matter adverse to the right of the party by whom it is alleged, and such matter is so clearly expressed that no reasonable construction can alter its meaning, a verdict will not aid or cure it. 3. At certain stages of the cause, all objections of form are cured by the different statutes of *jeofails* and *amendments*. Neither after verdict, nor after judgment by confession, *nil dicit*, or *non sum informatus*, can the judgment be arrested or reversed for any objection of the mere form.

Sec. 1642. OF THE PLEADER'S ELECTION TO DEMUR OR PLEAD.—Even though ground for demurrer exists, it is not always advisable to demur. The statutes of *jeofails* and *amendments* are so liberal that when the defect is one of form merely it will be remedied thereby, and the only effect of demurrer would be to delay the proceedings and give the opposite party an opportunity to improve his pleadings; or if the defect was one not curable by the statutes, it may be better to wait and take advantage of it by motion in arrest of judgment, or for dismissal of the cause, etc. Sometimes, also, by passing an objection and pleading over instead of demurring, one obtains the advantage of contesting with his adversary first upon

*1 Saund. 288, N. (1).

an issue of fact, and afterwards, if the verdict goes against him, of moving in arrest of judgment, or taking out a writ of error, which course is only open when the defect is one which is not cured by verdict. So costs are not allowed when the judgment is arrested, nor when it is reversed upon writ of error, but on demurrer the successful party obtains his costs.

Sec. 1643. PLEADINGS IN GENERAL.—Under this head, Mr. Stephen examines: 1. The nature and properties of *traverses*. 2. The nature and properties of pleading in *confession* and *avoidance*. 3. The nature and properties of *pleadings in general*, without reference to their quality, as being by way of traverse, or confession and avoidance.*

Sec. 1644. OF THE NATURE AND PROPERTIES OF TRAVERSES.—Of the various kinds of traverses, the most ordinary kind is called the *common* traverse. It consists of a *tender of issue*, that is, of a denial accompanied by a formal offer of the point denied for decision, and the denial that it makes is by way of *express contradiction in terms of the allegation traversed*. These are generally expressed in the negative, but if opposed to a precedent negative allegation, then, of course, it is in the affirmative.

There is another class of traverses of frequent occurrence, known as *general issues*, so called because the issue that one of them tenders involves the whole declaration or the principal part of it, and usually the

*Stephen on Pleading, 153.

contradiction is *not in terms of the allegation traversed*, but in a more *general* form of expression. Thus, in *debt* upon *specialty*, the general issue is called the plea of *non est factum*; upon simple contract, the plea is *nil debet*. In *covenant* it is *non est factum*. In *detinue* it is *non detinet*. In trespass, and trespass on the case in general, it is *not guilty*. In trespass on the case on promises (*assumpsit*) it is *non assumpsit*. In replevin it is *non cepit*. The great practical advantage of the general issue is that it brings to issue at the earliest possible stage in the cause, and in many cases it puts the plaintiff to the proof of every substantial part of his cause of action, that is, the general issue usually admits nothing, and denies all.

Sec. 1645. SAME SUBJECT—OF THE EFFECT OF GENERAL ISSUES.—The general issue of *non est factum* denies that the deed mentioned in the declaration is the deed of the defendant. Under this traverse, the defendant, at the trial, may contend either that he never executed such deed as alleged, or that the alleged deed is absolutely void in law. But matters which make it voidable only, as infancy and duress, must be specially pleaded.

Nil debet, as a traverse, is much broader than *non est factum*. It is adapted to any kind of defense that denies an existing debt. This includes not only a denial of the sale and delivery of goods, etc., but also *release*, *satisfaction*, *arbitrament*, etc., and in fact almost all matters of defense to an action of debt.

Non detinet says that the defendant "does not de-

tain the said goods", etc., the said goods being specified as the goods "of the plaintiff." Under it, therefore, the defendant denies either the detention charged, or else the plaintiff's property in the goods in question.

In the action of trespass upon the person *not guilty* amounts only to a denial of the trespass alleged, and does not permit any excuse of the trespass. Such matter in excuse must be specially pleaded. In trespass *quare clausum fregit*, it may deny the breaking and entering, or the plaintiff's possession. In trespass *de bonis*, it denies the taking and also the ownership or possession of the goods.

So far the effects of the general issue is consistent with the form and principle of these pleas, but in the general issues in trespass on the case in promises (*assumpsit*), and trespass on the case in general, the effect of the general issue is much broader. It will be remembered that the action of *assumpsit* first grew up in its general form, where the promise is implied; here where the promise might be shown by implication, it was considered only fair that the defense be treated with equal liberality, hence the defendant, under his plea of *non-assumpsit*, was at liberty to show any circumstance tending to disprove the debt or liability alleged. By gradual relaxation, this liberality was extended to *special assumpsit* also, so that under *non-assumpsit* the defendant is permitted to show any matter of defense except *tender*, *bankruptcy*, *statute of limitations*, *discharge under the insolvency acts*, *set off*, and defenses under the court of conscience acts. But

set off may be shown if notice of it be given with the plea. A similar relaxation exists with regard to the plea of *not guilty*, in the case of trespass on the case in general. But the statute of limitations, the truth of the statement alleged to be libelous, and the retaking upon fresh pursuit in an action for escape, must all be specially pleaded.

But even in the case of matters in confession and avoidance that may be shown under the general issue, the defendant may, if he so desires, plead them specially. The chief advantage of pleading specially is that it compels the plaintiff to reply, in doing which he is confined to a single answer. This often puts him to a great disadvantage, for he may have several answers to the defendant's case, and where the general issue is pleaded, may avail himself of them all.

The general issue of *non cepit* applies where the defendant has not in fact taken the goods in question, or where he did not take them or have them in the place alleged; but singularly enough, it does not deny the plaintiff's property in the goods.

Sec. 1646. OF SPECIAL TRAVERSES.—A special travers is a pleading which sets out with a detail of circumstances inconsistent with those stated in the preceding pleading to which it purports to be an answer, and then directly denies some fact stated in the preceding pleading and concludes with a verification. The detail of inconsistent circumstances with which it commences, is called the *inducement* to the traverse;

the denial is called, from its introductory words, the *absque hoc* (without this).

This indirect form of denial might be advisable in any of four classes of circumstances, as follows:

1. The case might be one in which some principle or rule of law was opposed to a direct denial.

2. Some fact, ordinarily immaterial, but in the present case material, might be falsely pleaded by the adversary, and the purpose of the defense would require the materiality of that fact to be made apparent on the face of the pleading.

3. It might be desirable in the particular case to separate questions of law from those of fact.

4. The party pleading the special traverse may desire to get by so doing the right to open and conclude the cause.

An example under the first class of circumstances may be as follows: Lessor's heir sues the lessee for non-payment of rent, alleging in lessor a title in fee simple. A rule of law prohibits the lessee from denying the lessor's title, but does not compel him to admit the precise title alleged, so that a special pleading may raise the issue that lessor did not have a title in fee but only a life estate.

Under the second class it may be observed, that while the time and place of facts constituting transitory causes of action are immaterial, yet if the question involved is one of authority, as of a sheriff, time and place become material incidents.

Under the third class, in an action of waste, the

acts of devastation may have been committed by rebels in arms. And the defendant wishes to raise the question of his legal liability for such acts, and therefore pleads the fact of devastation wrought by rebels in arms, and under the *absque hoc* denies his guilt. This compels plaintiff to demur, or else to join issue upon the fact that rebels committed the waste charged.

The special traverse concludes with a verification, it puts, therefore, the affirmative of the issue upon the party pleading it, and thus gives him the right to begin and conclude at the trial.

Sec. 1647. A SPECIAL TRAVERSE MUST ALWAYS CONSIST OF THREE PARTS.—A special traverse always consists of three parts, as follows: 1. The affirmative part or *inducement*, which generally introduces new matter, and constitutes the indirect or argumentative denial. 2. The *negative* part, which contains the direct denial, and is called, from the Latin word introducing this part, the *absque hoc*, although similar words, *et non* (and not) might also be used. 3. The *verification* and *prayer for judgment*, with which the form of traverse originally concluded.

The regular method of pleading in answer to a special traverse is to tender issue upon it, with a repetition of the allegation traversed.

The *absque hoc* was necessitated by the rule of pleading that prohibits argumentative denials. The *verification* was required by the rule that wherever new matter is introduced in a pleading, it is improper to tender issue.

Owing to the prolixity of the special traverse and the fact that it delayed the issue by one step, the courts set themselves against it, and finally laid down the rule that, "where the whole substance of the last pleading is denied, the conclusion must be to the country, but where one of several facts only is the subject of denial, the conclusion may be either to the country, or with a verification, at the option of the pleader."

The *inducement* in a special traverse should be such as in itself amounts to a *sufficient answer in substance* to the last preceding pleading, and it must not consist of a *direct* denial. It must not be in the nature of a confession and avoidance, since this does not deny but rather admits.

The opposite party has no right to traverse the inducement, except where the denial under the *absque hoc* is bad. If the *absque hoc* is sufficient in law, the inducement cannot be confessed and avoided, but if it is insufficient in law the opposite party then has the right to plead in confession and avoidance of the inducement, or to traverse it; or he may demur to the whole traverse for the insufficiency of the denial.

Sec. 1648. PRINCIPLES APPLICABLE TO TRAVERSES IN GENERAL.—The following principles are applicable to traverses in general:

1. A traverse must deny *modo et formo* (in manner and form) as alleged. This is required that the traverser may take advantage of any variance between his opponent's allegations and his proof. But these words, though usually employed, are not so essential

that their omission is cause for demurrer, and they are not used in the general issue of *non est factum*, nor in the replication *de injuria*.

2. A traverse must not be taken upon a *matter of law*. A demurrer is the appropriate form for testing the correctness of an allegation of law. But where an allegation is a confusion of law and fact, it may be traversed.

3. A traverse must not be taken upon matter not alleged, but it may be taken upon matter not expressly alleged, if it is necessarily implied.

4. A party to a deed who traverses it must plead *non est factum*, and should not plead that he did not grant, did not demise, etc. This is to avoid the doctrine of estoppel. For a man is sometimes in law precluded from alleging or denying a fact because by some previous act, allegation, or denial, he has taken a position inconsistent with the one he now desires to take, and such a preclusion is called an *estoppel*. Estoppel may arise: (a) From matter of record; (b) from the deed of the party; (c) from matter in *pais*, that is, matter of fact. Thus, any confession or admission in a pleading in a court of record, whether it be express or be implied from pleading over without a traverse, will,—unless coupled at the time with a saving *protestation*,—forever preclude the party from afterwards contesting the same fact in any subsequent suit with the same adversary. So a recital of a certain fact by the party in any deed which he executes, precludes his denying that fact in any action brought by or against

him upon that deed. And where one party accepts rent from another he is thereby estopped from denying in any action with such party, that the party paying the rent was not in fact at the time his tenant. But a stranger to a deed is not estopped to deny allegations of the deed; hence, when he is sued, he pleads *non est factum*, but not *concessit*, etc.

Sec. 1649. OF PLEAS IN CONFESSION AND AVOIDANCE.—Pleas in *confession* and *avoidance* are divided, with respect to their subject matter, into: 1. Pleas in justification or excuse. 2. Pleas in discharge.

The effect of pleas in justification or excuse is to show that the plaintiff never had any right of action, because the act charged was lawful; while the effect of pleas in discharge is to show some discharge or release of the matter complained of in the declaration; that is, though there was once a right of action, it has been discharged or released by some subsequent matter. This division of the subject applies to *pleas* only. Replications and subsequent pleadings in confession and avoidance are not subject to any such classification.

Pleadings in confession and avoidance, in common with all other pleadings that do not tender issue, conclude always with a *verification* and a *prayer of judgment*.

Every pleading by way of confession and avoidance must give color, that is, it must admit an apparent right in the opposite party, and rely on some new matter by which that apparent right is defeated. Such

color as being inherent in the pleadings is called *implied color*; but some circumstances of fact contain no inherent or implied color, and here the pleader wishing to plead by way of confession and avoidance must give color, by which is meant a "feigned matter," pleaded by the defendant in an action of trespass from which the plaintiff seems to have a good case of action, whereas he has in truth only an appearance or color of cause.

By pleading by way of confession and avoidance the defendant gains several advantages: Thus, he spreads his title on record and obliges the plaintiff, if he regards it as not a lawful title as thus exhibited, to demur and present the question to the court, instead of its going along with the other matters to the jury, as would have been the case upon a plea by way of traverse. The plea in confession and avoidance also obliges the plaintiff to traverse or attack but a single link in the defendant's chain of title, and thus to admit all the others as good. Such a plea also gains for the party the affirmative of the issue, and therefore the right to open and close.

The plaintiff was not allowed in his replication to traverse the fictitious matter suggested by way of color; for its only object being to circumvent a difficulty of form, such a traverse would be wholly foreign to the merits of the case.

The practice of giving express color is now confined to actions of trespass, and in those actions to the plea only. It is unusual to resort to any except cer-

tain known fictions which long usage has applied to the particular case. The fictitious averment must consist of such matters as, if it were effectual, would sustain the nature of the action, and the right suggested must be *colorable* only, for if more than colorable the plaintiff would, by the defendant's own showing, be entitled to recover.

Sec. 1650. OF THE NATURE AND PROPERTIES OF PLEADING IN GENERAL.—The following propositions are to be observed with regard to the nature and properties of pleadings in general: 1. Every pleading must be an answer to the whole of what is adversely alleged. If it answer part only, the opposite party is entitled to take judgment for the part left unanswered, and his omission to do so will be a *discontinuance* or abandonment of the whole action. If it attempts to answer the whole, but is insufficient, then the opposite party's course is to demur to the whole plea. Where the part not answered is immaterial or such as requires no separate or specific answer, the rule does not apply.

2. Every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse; and this effect continues through all *subsequent actions* between the same parties. The effect in regard to subsequent actions may be avoided by the practice of *protestation*. And even this does not save the party protesting unless the issue is decided in his favor, unless the matter be such as the party protesting was precluded by some rule of law from taking issue

upon. A protestation ought not to be repugnant to the pleading which it accompanies, nor ought it to be taken upon such matters as the pleading itself traverses. As protestations are made only to save advantages in subsequent suits, any faults in their forms are not subject to demurrer.

The rule requiring a party, at each stage after the declaration, to demur, or plead, does not apply to: 1. Dilatory Pleas. 2. Pleadings in *estoppel*. 3. Where a *new assignment* is necessary. These exceptions may be explained as follows:

1. Dilatory pleas merely oppose a matter of form to the declaration, and do not tend either to deny or to confess its allegations. Replication and subsequent pleadings following on dilatory pleadings are not within this exception.

2. Pleadings in *estoppel* neither admit nor deny the matter of fact adversely alleged, but merely state the previous act, allegation or denial on which the estoppel is declared by the pleader to arise, and pray judgment if the adverse party shall be *received or admitted to aver contrary* to what he before did or said.

3. Declarations are conceived usually in very general terms. In some cases the defendant is not sufficiently guided and confined by the declaration to the real cause of complaint, and thus applies his plea to a different matter from that which the plaintiff has in view. This compels the plaintiff to make, in his replication, a *new assignment*, or statement of his cause of action, in which he guards against a repetition of the

defendant's mistakes. Where the plea correctly applies to a part of the injuries complained of, but owing to the generality of the statement in the declaration, fails to cover the whole, the plaintiff's course is *both to traverse the plea and to new assign*. Thus, in a charge of trespass, if the defendant pleads that he has a right of way over a certain part of the close, and that the alleged acts of trespass were committed by virtue of this right of way, the plaintiff replies by alleging that he brought this action not only for those trespasses mentioned by the defendant, but for others committed on other occasions and at other places, beyond the supposed way, which is usually called a new assignment *extra viam* (beyond the way), or, if the plaintiff means to admit the right of way, he may assign simply, without the traverse. The new assignment should be sufficiently specific, if possible, to prevent a repetition of the defendant's mistake.

Sec. 1651. RULE II.—UPON A TRAVERSE ISSUE MUST BE TENDERED.—The second general rule of pleading is that *upon a traverse, issue must be tendered*. The traverse involves a contradiction or denial of the preceding pleading, hence an issue in fact has been reached, and the rule expresses the sensible requirement that the method of deciding the issue be now adjusted.

The *formulae* of tendering the issue in fact, vary according to the mode of trial proposed. Thus, the tender of an issue to be tried by *jury* is by a formula called the *conclusion to the country*. In this the de-

fendant "puts himself upon the country"; the plaintiff prays that the issue "may be inquired of by the country." There is, however, no substantial difference between these two modes of expression, and no substantial objection can be taken if they are interchanged.

Where *new matter* is introduced, the pleading should always conclude with a *verification*.

Sec. 1652. RULE III.—ISSUE WHEN WELL TENDERED MUST BE ACCEPTED.—The third rule of pleading is that if issue be well tendered both in substance and form it must be accepted, and the other party may not demur, traverse, or plead in confession and avoidance. The exception to this rule is, that a party may plead in *estoppel* even after issue is well tendered.

The acceptance of the issue, in case of trial by jury, is called the *similiter*, because the usual form of wording it is, "And the said A. B. doth the like." This is added in making up the issue or paper-book. It may be filed or delivered, however, before that transcript is made up, in which case its form is slightly different, and it is called a *special similiter*.

As the party has no option in accepting an issue when well tendered, the entry of the *similiter* is a mere matter of form, and may be made by the party who tenders the issue. But the other party for whom this *similiter* is thus entered, may, if he conceives that the issue is not well tendered, strike out the *similiter* and demur to the defective tender.

The rule that an issue must be accepted, extends

to an issue in law also, so that the party whose pleading is opposed by a demurrer is required to accept the issue in law, and the formula by which he does this is called a *joinder in demurrer*. Here he is bound to accept, however, for he cannot demur to a demurrer.

So far we have discussed rules which tend simply to the production of an issue.

Sec. 1653. OF RULES WHICH TEND TO SECURE THE MATERIALITY OF THE ISSUE—THE GENERAL RULE.—*All pleadings must contain matter pertinent and material.* This is essential to keep the issue from going astray. As where the declaration on assumpsit laying promises by the intestate, should be traversed by the defendant administratrix as to her own promises instead of those of the intestate, such plea would be immaterial and bad.

As to traverses this rule includes the following:

1. A traverse must not be taken on an *immaterial* point; or upon matter the allegation of which was premature; or upon matter of aggravation; or upon matter of inducement. But this last rule does not apply where the introductory matter is in itself essential, and of the substance of the case, for in such a case it may be traversed. Also, where there are several material allegations, the pleader may traverse whichever he pleases, since if he breaks a single link he breaks the chain.

2. A traverse must not be *too large*, nor *too narrow*; that is, it must take in no more, and no less of the allegation traversed than is material.

A traverse may be too large by involving in the issue quantity, time, place, or other circumstances, which, though forming part of the allegation traversed, are immaterial to the merits of the cause. A traverse may also be too large by being taken in the conjunction instead of the disjunctive, where it is not material that the allegation traversed should be proved conjunctively. On the other hand, a party may, generally, traverse a material allegation of title or estate to the extent to which it is alleged, though it need not have been alleged to that extent, and such traverses will not be considered too large.

A traverse is *too narrow* when it fails to answer fully the whole of the adversary's allegation which it purports or undertakes to answer. So, a traverse may be too narrow by being applied to a part only of an allegation which the law considers as in its nature indivisible and entire, such as that of a prescription or grant. The principle which forbids too narrow a traverse is the same as that which requires that every pleading shall really answer so much of the adversary's pleading as it professes and undertakes to answer.

Sec. 1654. OF RULES WHICH TEND TO PRODUCE SINGLENESS OR UNITY IN THE ISSUE—RULE I.—PLEADINGS MUST NOT BE DOUBLE.—The first rule tending to produce singleness or unity of the issue is, that *pleadings must not be double*.

With respect to the declaration, this rule means

that the declaration must not, in support of a single demand, allege several distinct matters, by any one of which that demand is sufficiently supported. With respect to the subsequent pleadings, none of them is to contain several distinct answers to that which preceded it. The reason in both cases is that such pleading tends to several issues concerning a single claim. The rule in terms prohibits only *doubleness* or *duplicity*, but it will include *multiplicity also*. The purpose of the rule is to secure a single issue upon a single subject of claim or defense. The declaration may, therefore, in support of several demands, allege as many distinct matters as are respectively applicable to each. And the plea may make distinct answers to such parts of the declaration as relate to different matters of claims or complaints. Likewise in the replication and subsequent pleadings. But the power of alleging in a plea distinct matters in answer to such parts of the declaration as relate to different claims, seems to be subject to this restriction,—that none of the matters alleged be such as would alone be a sufficient answer to the whole.

If there be two or more defendants the rule against duplicity is not carried to the extent to compel each of them to make the same answer to the declaration. The defendants may either join in the same plea, or sever, at their discretion. But if they have united in the plea, they cannot *sever* at the rejoinder or other later stage of the pleading. A pleading that contains several answers is double, even though the answers be

of different classes. Matter may suffice to make a pleading double, even though it be ill-pleaded. But matter purely immaterial cannot make a pleading double. The purely immaterial matter is surplusage and may be stricken out, no issue can be taken upon it, and it therefore does not tend to prevent singleness of issue. Nor will matter pleaded only as necessary inducement to another allegation operate to make a pleading double. No matters, however multifarious, will operate to make a pleading double, if, taken together, they constitute but *one connected proposition* or entire point. This applies not only to pleas in confession and avoidance, but to traverse also, so that a man may *deny* as well as affirm, any number of circumstances that together form but a single point or proposition. A traverse of several matters thus connected is called a *cumulative traverse*. But if the matters so connected require when separate, some to be traversed by one species of traverse, and some by another, then a cumulative traverse seems to be improper.

A protestation does not make a pleading double, since it does not tend to an issue, but merely saves to the party the right of denying, in a future suit, between the same parties, the matter admitted in the present suit.

Where a plaintiff has several distinct causes of action, he is allowed to pursue them cumulatively in the same original writ, provided they conform to certain rules which the law prescribes as to joining only such demands as are of a similar quality or character. Such

different claims or complaints constitute different parts or sections of the declaration, and are known in pleading by the designation of *counts*.

Sec. 1655. SAME SUBJECT—OF THE USE OF SEVERAL COUNTS.—Distinct causes of actions of the same quality or character may be joined in one action by the use of separate or several counts for each claim. When several counts are thus used, the defendant may, according to the nature of his defense, demur to the whole; or he may plead a single plea applying to the whole; or he may demur to one or more counts, and plead to the others; or he may plead a several plea to each count; and in the two latter cases, the result may be a corresponding severance in the pleadings, and the production of several issues.

But whether one or more issues be produced, if the decision, whether in law or in fact, be in the plaintiff's favor, as to any one or more counts, he is entitled to judgment *pro tanto* (for so much) though he fail as to the remainder. All this is quite consistent with the rule against duplicity.

But through this practice of using counts the pleader for the plaintiff, at an early date became able to evade the rule against duplicity by stating what was really but a single cause of action as though it were several,—slightly varying his descriptions in each count. His principal purpose in so doing was, of course, to make himself more secure against the insufficiency of any one statement of his cause; also to lessen the possibility of a variance between his allega-

tions and the proof that might develop in the course of the trial. As the court visited no censure upon the pleader, even though the event of the suit showed quite conclusively that he never really supposed himself to be enforcing more than one cause, this practice speedily became universal. The same statement of facts may be varied by omitting in one count some matter stated in another. In such a case the more special count is used, lest the omission of this matter render the other insufficient in point of law. The more general count is used, because if good in point of law, it will relieve the palintiff from the necessity of proving such omitted matter in point of fact. If the defendant demur to the more general count as insufficient, and take issue in fact upon the other, the plaintiff has the chance of proving the matter alleged, and also the chance of succeeding in the demurrer. If, on the other hand, the defendant do not demur, but take issue in fact upon both, it will be sufficient for the plaintiff to prove the more general count. The several counts must always *purport* to be founded on distinct causes of actions, and not to refer to the same matter. This is accomplished by the pleader by inserting such words as "other", "the further sum", etc. The pleader may evade the rule against duplicity but the court would be shocked if he were to violate it.

To several counts, or distinct parts of the same count, the defendant may plead several pleas, that is, one to each count.

But in the light of the practice of pleading the same

cause of action in different forms, as though there were really several causes, it seemed unjust that the defendant should not be given equal freedom in pleading his defense, so in 1705 it was enacted that "it shall be lawful for any defendant or tenant, in any action or suit, or for any plaintiff in replevin, in any court of record, with leave of the court, to plead as many several matters thereto as he shall think necessary for his defense." This requires that the defendant, before pleading his several defenses, get leave from the court so to do. Where the defendant pleads several defenses, the plaintiff has the same privilege of demurring to all, or to some, and pleading to the others; or pleading to all, as has the defendant with regard to the plaintiff's several counts.

Though the statute presumable intended to allow one plea for one ground of defense, yet the same relaxation has grown up here as with regard to the plaintiff's several counts. But the court will sometimes refuse leave to the defendant to plead inconsistent pleas.

It will be noticed that the statute extends only to pleas, and does not apply to replications and subsequent pleadings; nor does it apply, it is held, to dilatory pleas. The several matters of defense must be pleaded formally, with the words, "by leave of the court for this purpose first had and obtained". Each one must also be pleaded as a new and further plea, with a formal commencement and conclusion as such. But in all these cases, if the opposite party does not

demur, for the duplicity, but instead pleads over, he must answer each matter alleged.

Sec. 1656. RULE II.—IT IS NOT ALLOWABLE BOTH TO PLEAD AND TO DEMUR TO THE SAME MATTER.—The second rule to procure the singleness or unity of issue, is that the pleader cannot both plead and demur to the same matter. This rule does not extend to prohibit one from pleading to one distinct matter and demurring to another. So the statute authorizing several pleas discussed in the last section, does not allow pleading and demurring to the same matter.

Sec. 1657. OF RULES WHICH TEND TO PRODUCE CERTAINTY OR PARTICULARITY IN THE ISSUE—RULE I.—The rules of pleading tending to produce certainty in the issue are numerous, the first of which is: The *pleadings must have certainty of place*. This rule grew out of the former requirement that the jurors should be from the locality wherein the cause was alleged to have arisen, thus making it necessary to allege the place with particularity. Such place is called the *venue* of the action, and to allege it in the declaration is to *lay the venue*.

The original writ must be directed to the sheriff of some county, and in that county the action is said to be brought or laid. Each affirmative traversable allegation in the writ is to be laid with a *venue* or place, comprising not only the county in which the fact occurred, but also the parish, town or hamlet within that county; but no such particularity is required in mere mat-

ters of inducement. Of the different facts alleged in the writ, it is necessary that some principal one, at least, should be laid in some parish, town or hamlet, within the county in which the action is brought, in order to justify the bringing of the action in that county, and such *county* and the *particular place* so laid within it are called the *venue in the action*, or the venue where the action is laid.

The declaration must have the same venue as the original writ. The county where the action is laid is placed at the commencement in the margin of the declaration. And all the different affirmative traversable allegations are to be laid with a venue in parish, town or hamlet, as well as county, in the same manner as in the original writ, and in accordance with it.

In proceedings by bill, the law of venue is the same, except, of course, that there is no original writ, and that the bill first states the venue. The plea, replication, and subsequent pleadings lay a venue to each affirmative traversable allegation, according to the principles already stated, until issue joined.

Under the early law, because jurors were required to be men acquainted with the facts, they were required to be summoned from the venue of the action. Later, as they became transformed into judges of the facts, determining them from the evidence, this requirement became a matter of mere form, and it was considered sufficient if no more than two jurors were from the venue. Finally, in 1865, one of the statutes

of jeofails (16 and 17 CAR. II, c. 8), provided that "after verdict, judgment shall not be stayed or reversed, for that there is no right venue, so as the cause were tried by a jury of the proper county or place where the action is laid." Before that time it had been ground for arresting or reversing judgment in case the jury had been summoned from the *venue in the action* when that differed from the *venue laid to the fact in issue*.

Another statute (4 Anne, c. 16), provided that "every *venire facias* for the trial of any issue shall be awarded of the body of the proper county where the issue is triable", instead of being as formerly, awarded from the particular venue of parish, town or hamlet. The joint effect of these two statutes is that the *venire* now directs that the jury in all cases shall be summoned from the body of the county in which the action is laid, whether or not that be the venue of the fact in issue.

Actions are either *local* or *transitory*. An action is *local* if all the principal facts on which it is founded be local. It is *transitory* if any principal fact be of the transitory kind. And a fact is transitory when it might equally well have occurred elsewhere than where it did; as, for example, an assault. An action is local if it could not have occurred elsewhere, as a trespass to a particular parcel of land. The venue of local facts must be truly laid. In transitory facts is need not be; and as the locality of a transitory fact is immaterial, there can be no variance in regard to it.

So in transitory actions the venue may be laid at pleasure, but in local actions must be laid truly. But the plaintiff's freedom to lay the venue of a transitory action where he pleases is checked by a practice of the court to allow the defendant to move the court to have the venue changed so as to be in conformity to the fact. This motion, when supported by affidavit that the cause of action arose wholly in the county to which it is proposed to change the venue will, in most cases, be granted, and the plaintiff obliged to amend his declaration in this regard, unless he, on the other hand, will undertake to give at the trial, some material evidence arising in the county where the venue was laid. The rule is, that while the venue of transitory facts need not be laid truly, it cannot be anything at pleasure, but must be the venue laid in the action. No venue need be laid with respect to transitory matters in the pleadings subsequent to the declaration, because, with respect to every matter of this description, the original venue will be taken to be implied, but it is usual to lay a venue in these, and is the better course.

When transitory matters are laid out of their true place, they should be laid *under a videlicet*, that is, with the prior intervention of the words, "to-wit" or "that is to say". The effect and object of the *videlicet* is to mark that the party does not undertake to prove the precise place alleged. The proper method of alleging a local matter occurring outside the realm was arranged in this fashion, "In parts beyond the seas, at Fort St. George, in the East Indies, to wit, at West-

minster, in the county of Middlesex." The true place being followed by a *videlicet* and then a county in England. This method is also usually applied to local matters arising within the realm if they happen at a different venue from that laid in the action.

Where place is alleged as a matter of description and not as a venue, it must in all cases be stated truly, under peril of variance.

If no venue be laid in the declaration the defendant may demur, or may plead the defect in abatement. Even in local and penal actions, the only modes of objecting to the venue are by demurrer, or at the time as ground of non-suit.

Sec. 1658. RULE II.—PLEADINGS MUST HAVE CERTAINTY OF TIME.—The second rule tending to produce certainty in the issue, is *that the pleadings must have certainty of time*. In personal actions the pleadings must allege the time, that is, the day, month and year when each traversable fact occurred; and when there is occasion to mention a continuous act, the period of its duration ought to be shown. But no *time* need be alleged to matter of mere inducement or aggravation. Wherever it is necessary to lay a venue, it is also necessary to mention time. But in transitory matters *time* occupies a place of importance corresponding to that of *place*; hence the truth of the allegation of time is usually unimportant. But where the time is not stated truly, it must be laid under a *videlicet*, and it should never be so stated as to show an intrinsic impossibility, nor is it ever permis-

sible to have it inconsistent with the fact to which it relates. Such misstatement, if in regard to a traversable fact, would make the pleading demurrable. Whenever time is material, that is, is of the substance of the issue, a misstatement of it is not helped by being under a *videlicet*. So where time is immaterial it should, in subsequent pleadings, follow the day alleged in the declaration and writ. If, in this case, no time is stated in such pleadings, the defect is cured by the verdict or by the judgment; but verdict and judgment do not cure the omission if time is material.

Sec. 1659. RULE III.—THE PLEADINGS MUST SPECIFY QUALITY, QUANTITY, AND VALUE.—The third rule under this division is that *the pleadings must specify quality, quantity and value.*

Value must be specified in the legal denominations of the money of the country. Quantity should be specified by the ordinary measures of extent, weight or capacity.

Where the nature of the subject matter will not conveniently admit of exact specification of quality or quantity, loose and general specification is sometimes admitted. In some kinds of actions, as *debt*, and *indebitatis assumpsit*, modern practice does not require quality, quantity or value of the goods sold in the pleading, but the amount due must be pleaded.

It is usually not material that quantity and value be proved as laid when they are laid under a *videlicet*, but a verdict cannot generally be obtained for a larger

quantity or value than is alleged. But quality must be strictly proved as laid.

Sec. 1660. RULE IV.—THE PLEADINGS MUST SPECIFY THE NAMES OF PERSONS.—Another rule to produce certainty in the issue is, *that the pleadings must specify the names of persons*. This rule applies to the *parties to the suit*. Each must be described by the true Christian and surname, and if either be mistaken or omitted, it is ground for plea in abatement. So names of dignity are equally important.

So the rule applies to all other persons mentioned in the pleadings with the exception that if the names of any such be not known to the pleader, he should so state, in which case the omission is excused.

Mistake in the name of a *party* is ground for plea in abatement only; but a mistake in the name of any other is fatal.

Sec. 1661. RULE V.—THE PLEADINGS MUST SHOW TITLE.—Another rule to attain certainty is *that the pleadings must show title*. Under this rule, where a party alleges title in himself or another whose authority he pleads, it is often sufficient to allege a title of possession; that is, that the property is “the goods and chattels of the plaintiff”, or “that plaintiff was lawfully possessed of them as of his own property”, or “the close of the plaintiff”, etc. A title of possession will be applicable, that is, will be sufficiently sustained by the proof of an interest in remainder or

reversion. Where a title of possession is applicable, the allegation of it is, in many cases, sufficient in pleading, without alleging title of a superior kind, the rule being that it is sufficient to allege *possession* as against a *wrongdoer*. This does not hold good, however, in *replevin*, or in *real* or *mixed* actions.

Where the rule as to alleging possession against a wrongdoer does not apply, there, though the interest be present, or possessory, it is generally not sufficient to state a title of possession, but some superior title must be shown, and it must be alleged in its full and precise extent.

Where a party alleges *title in his adversary*, it is not necessary to allege it more precisely than is sufficient to show a liability in the party charged, or to defeat his present claim. Usually it is sufficient to allege a merely possessory title, though this is not always so, as, for example, in suing the defendant for rent. Even where the allegation of possession is not sufficient, the derivation of title, if required to be shown at all, is never expected to be shown as fully and precisely as when the party is pleading his own title. Title is ordinarily, of the *substance* of the issue, and when so it must be proved strictly as laid.

Certain exceptions to the foregoing should be stated. Thus no title need be shown where the opposite party is estopped to deny the title; this is only where the estoppel goes to the full extent of the title which the pleader desires to establish; if it stops short of this point, the title should be alleged.

Sec. 1662. RULE VI.—THE PLEADINGS MUST SHOW AUTHORITY.—This rule of certainty, *that the pleadings must show authority*, applies when a party has occasion to justify under a writ, warrant, precept, or any other authority, whatever, he must particularly set it forth in his pleading, and he must also show that he has substantially pursued such authority.

It is not necessary that any person justifying under judicial process should set forth the cause of action in the original suit in which that process issued. And it is sufficient for the officer executing such writ, to plead the writ only, but any other person must plead the underlying judgment as well as the writ.

If an officer justifies, and the writ was *returnable*, he must plead that *it was returned*; otherwise with the one who has not the power to procure a return to be made.

Where it is necessary to plead the judgment of a superior court it is not necessary to plead any of the previous proceedings; otherwise with a court of inferior jurisdiction, where the jurisdiction is never presumed. Likewise the jurisdiction of foreign courts is not presumed.

But where an authority may be created orally and generally, it is allowable to plead it in general terms. Averments of authority must be *strictly* proved.

Sec. 1663. RULE VII.—IN GENERAL, WHATEVER IS ALLEGED IN PLEADING MUST BE ALLEGED WITH CERTAINTY.—In accordance

with this rule, that *whatever is alleged in pleading must be alleged with certainty*, where the performance of a condition or covenant is pleaded, it must usually be pleaded fully and specifically. But this rule is relaxed where there is such multiplicity of matter as would lead to great prolixity.

And where the condition is for the performance of matters set forth in another instrument, and the matters are in an affirmative and absolute form, and neither in the negative or disjunctive, a general plea of performance is sufficient. Where a bond is conditioned for indemnifying the plaintiff, a general plea of *non damnificatus* is sufficient. But even in these excepted cases, the plaintiff in his replication must show particularly in what way the condition or covenant has been broken.

With respect to all points on which certainty of allegation is required, the allegation, when brought into issue, must usually be proved substantially as laid, with the exception of *place, time, quantity* and *value*, and even in these cases in certain issues.

Sec. 1664. LIMITATIONS UPON THE PRECEDING SEVEN RULES.—There are certain limitations and restrictions placed upon the foregoing rules tending to produce certainty by other and subordinate rules of pleading, as follows:

1. It is not necessary in pleading to state that which is merely matter of evidence.
2. It is not necessary to state matter of which the

court takes notice *ex officio*. The court takes such notice of all *public* law, whether common or statute, but not of *private* law, unless the statute expressly so directs. It is necessary also, in some cases, to make mention of the law for the convenience or intelligibility of the statement of fact. As it is unnecessary to state matter of law in a pleading, it is equally improper to make it, when alleged, the subject of traverse.

3. It is not necessary to state matter which would come more properly from the other side. Thus, it is unnecessary to anticipate the answer of one's adversary. It is sufficient that each pleading should contain, in itself, a good *prima facie* case. But whatever is essential to a *prima facie* case *must* be stated. But there are certain pleas which are regarded unfavorably by the courts, as tending to shut out the truth, and these, such as *estoppel*, that the other party is an *alien* enemy, and the like, must be certain in every particular. They must meet and remove, by anticipation, every possible answer of the adversary.

4. It is not necessary to allege what the law will presume.

5. It is not necessary to allege circumstances necessarily implied.

6. A general mode of pleading is allowed where great prolixity is thereby avoided. The proper extent and application of this rule is largely a matter of practical judgment, only to be obtained by a study of the precedents.

7. A general mode of pleading is often sufficient

where the allegation on the opposite side must reduce the matter to certainty. Thus pleading performance in actions of debt on bond, and pleading *non damnificatus* in an action of debt on an indemnity bond may be general. Likewise where the condition is for the performance of covenants or other matters contained in an indenture or other instrument, collateral to the bond sued on, and not set forth in it. But this does not apply where the covenants or other matters mentioned in the collateral instrument are either in the *negative* or the *disjunctive* form, for here the allegation of performance should be more specially made, so as to apply exactly to the tenor of the collateral instrument.

In pleading performance of matters contained in a collateral instrument, it is necessary not only to crave oyer of the condition and set it forth, but also to make profert of the collateral instrument and set forth its whole substance.

8. No greater particularity is required than the nature of the thing pleaded will conveniently admit.

9. Less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading.

10. Less particularity is required in the statement of matter of inducement or aggravation than in the main allegations.

11. With respect to acts valid at common law, but regulated as to the mode of performance, by statute, it is sufficient to use, in the declaration, such certainty of allegation as was sufficient before the statute. But the

plea should show the agreement or other instrument to be in writing, if the statute makes writing necessary.

Sec. 1665. OF RULES WHICH TEND TO PREVENT OBSCURITY AND CONFUSION IN PLEADING. — RULE I. — PLEADINGS MUST NOT BE INSENSIBLE NOR REPUGNANT.— The first of the rules tending to prevent *obscurity* and *confusion* in pleading, is, *pleadings must not be insensible nor repugnant*.

A pleading is *insensible* when, through the omission of material words, and the like, it has become unintelligible. It is *repugnant* when its parts are inconsistent with each other. Repugnancy is ground for demurrer. If the second allegation, which creates the repugnancy, is merely superfluous and redundant, so that it may be rejected from the pleading without materially altering the general sense and effect, it shall, in that case, be rejected, at least if it laid under a *videlicet*, and shall not vitiate the pleadings, for the maxim is, *utile per inutile non vitiatur* (the useful is not vitiated by the useless).

Sec. 1666. RULE II.—PLEADINGS MUST NOT BE AMBIGUOUS, OR DOUBTFUL IN MEANING, AND WHEN TWO DIFFERENT MEANINGS PRESENT THEMSELVES, THAT CONSTRUCTION SHALL BE ADOPTED WHICH IS MOST UNFAVORABLE TO THE PARTY PLEADING.—Under this rule it is sufficient if the pleadings be *certain to a common intent*, that is,

if it be clear according to reasonable intendment and ordinary usage, without being absolutely precise.

A *negative pregnant* is such a form of negative expression as may imply or carry within it an affirmative. Such an expression in pleading is faulty under this rule as being *ambiguous*.

Sec. 1667. RULE III.—PLEADINGS MUST NOT BE ARGUMENTATIVE.—Another rule seeking to prevent obscurity and confusion in pleading is, that the *pleadings must not be argumentative*. Thus two affirmatives do not make a good issue, for the traverse by the second is argumentative in its nature. It is this rule against argumentativeness that necessitates the *absque hoc* in the special traverse. The vitiating affirmativeness must be in the *effect* of the words used and not merely in their *form*. So a traverse consisting of two negatives is equally bad, and for the same reason.

Sec. 1668. RULE IV.—TENDING TO PREVENT OBSCURITY AND CONFUSION.—Another rule under this division is, *pleadings must not be hypothetical, nor is it permissible to have them in the alternative*.

Sec. 1669. RULE V.—TO PREVENT OBSCURITY AND CONFUSION.—*Pleadings must not be by way of recital, but must be positive in their form*. Under this rule the pleader is required to positively aver the facts on which his complaint rests, and not put them in a narrative form. The requirement is not so strict in regard to matters of inducement,

Sec. 1670. RULE VI.—IN REGARD TO OBSCURITY AND CONFUSION.—*Things are to be pleaded according to their legal effect or operation.* But there is an apparent exception to this rule in the case of a slander or libel, in which the words themselves must be set forth, as the action turns on the words themselves.

Sec. 1671. RULE VII.—TO PREVENT OBSCURITY AND CONFUSION.—*Pleadings should observe the known and ancient forms of expression, as contained in approved precedents.*

Sec. 1672. RULE VIII.—TO PREVENT OBSCURITY AND CONFUSION.—*Pleadings should have their proper formal commencements and conclusions.*

The defendant's pleadings subsequent to the *replication* follow the same forms of commencement and conclusion as are used in the plea. The plaintiffs follow the same form as in the replication. But to this there are exceptions, as in the case of abatement *de facto*, as by death of the party before verdict, default judgment, and on plea founded on matter arising after the commencement of the action. So pleadings by way of estoppel have commencements and conclusions peculiar to themselves. Likewise in replevin.

If any pleading be intended to apply to part only of the matter adversely alleged, it must be qualified accordingly in its commencement and conclusion.

A defect or impropriety in the commencement and

conclusion of a pleading is generally ground for demurrer. But it has been held that it is sufficient if the commencement pray the proper judgment even though the conclusion be improper in form, and so also when the conclusion was correct, although the commencement was informal.

The commencement and conclusion determine the character of a pleading as to whether it is,—in case it be a plea,—to the jurisdiction, or in suspension, or in abatement, or in bar. This is usually expressed in the maxim, *conclusio facit placitam* (the conclusion makes the plea). Hence if the plea contain matter sufficient to make a good plea in bar, but conclude as in abatement, it is plea in *abatement* only, while if it contain only matter sufficient for abatement, and conclude as in bar, it is an insufficient plea in bar, and is bad. Similarly in the replication and subsequent pleadings.

Sec. 1673. RULE IX.—TO PREVENT OBSCURITY AND CONFUSION.—*A pleading which is bad in part is bad altogether.* The declaration is not within the rule, for it has only to show a cause of action, and worthless matter, beyond that is treated as mere surplusage. If a declaration be good in part, and bad as to another part relating to a distinct demand divisible from the rest, and the defendant demur to the whole instead of confining his demurrer to the faulty part only, the court will give judgment for the plaintiff. The rule is also applicable only to *material* allegations in any of the pleadings, as mere surplusage does not vitiate the rest of the pleading.

Sec. 1674. OF RULES WHICH TEND TO PREVENT PROLIXITY AND DELAY.—RULE I.—*There must be no departure in pleading.* A departure takes place, when, in any pleading, the party deserts the ground that he took in his last antecedent pleading and resorts to another.

A departure may be either: 1. In point of fact. 2. In point of law.

In all cases where the variance between the former and the latter pleading is on a point not material, there is no departure. If there were no rule against departure, the parties might shift their ground and delay the issue indefinitely.

Sec. 1675. RULE II.—TO PREVENT PROLIXITY AND DELAY.—*Where a plea amounts to the general issue it should be so pleaded.* It is held that the court is not bound to adhere to this rule, but that it may in its discretion, allow a special plea amounting to the general issue, if it involves such matter as might be unfit for the decision of a jury. It is also said that as the court has such discretion, the proper method of taking advantage of this fault is not by demurrer, but by a motion addressed to the court to set aside the plea and enter the general issue instead of it. It appears from the precedents, however, that the objection has frequently been allowed on demurrer.

Sec. 1676. RULE III.—TO PREVENT PROLIXITY AND DELAY.—*Surplusage is to be avoided.* By surplusage is meant, any unnecessary matter, of whatever description. It includes: 1. Matter whol-

ly foreign; 2. Matter not required to be stated. Thus matter of law, matter necessarily implied, matter coming more properly from the other side, and the like, are surplusage.

The statements in a pleading should be terse in manner. Surplusage is not a subject for demurrer, but any flagrant fault of this kind will, when brought to the notice of the court, be censured, and the surplusage be ordered stricken out at the costs of the delinquent pleader.

So unnecessary detail in pleading is sometimes dangerous, as it may be so intimately combined with material matter as to require, when traversed, to be proved as laid, thus increasing the danger of variance. When clearly and easily separable from material matter, the immaterial matter cannot be included in the traverse, but otherwise it may be.

Sec. 1677. OF CERTAIN MISCELLANEOUS RULES OF PLEADING.—I. *The declaration should commence with a recital of the original writ.*

II. *The declaration must be conformable to the original writ.* This does not mean that it must be identical with the writ. The declaration states the cause of action more specially than the original writ. But the various statutes of jeofails and amendments have largely deprived this rule of its original force.

III. *The declaration should, in conclusion, lay damages and allege production of suit.* The plaintiff cannot recover greater damages than he has laid in

the conclusion of his declaration. But the allegation of production of suit is now purely formal.

IV. *Pleas must be pleaded in due order.*

This order is as follows:

Pleas—

1. To the jurisdiction of the court.
2. To the disability of the person.

{	1. Of plaintiff. 2. Of defendant
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3. To the count or declaration.
4. To the writ.
5. To the action itself,—in bar thereof.

The defendant may plead all these pleas successively; but he cannot vary the order, nor can he plead two pleas of the same kind or degree. A plea of any one of these kinds, renounces the right to plead in that action, a plea of an antecedent kind. These pleas should also be pleaded with *defence*; the word defence meaning denies, and applies to the formula of words used to introduce the various pleas.

V. *Pleas in abatement must give the plaintiff a better writ or bill.* The meaning of this rule is that the pleader objecting to a formal defect in the adversary's pleading must *correct* the mistake by pointing out how it should have been alleged.

VI. *Dilatory pleas must be pleaded at a preliminary stage of the suit.* Thus dilatory pleas are not allowable after *full defence*, or plea in bar.

VIII. *All affirmative pleadings which do not conclude to the country must conclude with a verification.*

A verification is an offer to *verify* or prove the allegation to which it is attached. It is also called an *averment*. Verifications are of two kinds; *common* and *special*. The *common* verification is that which applies to ordinary cases, and is of this form,—“And this the said A. B. is ready to verify.” The *special* is used only when the matter is intended to be tried by some other method than by jury.

Although no verification is necessary in the case of a negative pleading, it has become customary to attach a verification to all such as do not conclude to the country.

IX. *All pleadings where a deed is alleged, under which the party claims or justifies, profert of such deed must be made.* This rule applies to deeds. But it includes letters testamentary and letters of administration, since executors and administrators are bound, when plaintiffs, to support their declarations by making profert of these instruments.

This rule applies only to cases when it is necessary to mention the deed in the pleading, and the party claims under the deed, or justifies under it. No profert is necessary when it is mentioned only as an inducement, or for some collateral purpose. The rule is also confined to cases where the party relies on the direct and intrinsic operation of the deed. The rule does not obtain where the deed has been lost or destroyed through time or accident, or is in the possession of the opposite party, but in these cases the pleading should show the facts.

X. *All pleadings must be properly entitled of the court and term.* The title of the term of court is either *general* or *special*. The *general* title shows the term only, and all pleadings so entitled are presumed to have been filed on the first day of the term named. The *special* title shows the day of the term also on which the pleading was filed, and should be used in the case of all pleadings filed after the first day of the term, if the presumption involved in the general title would occasion any repugnancy.

XI. *All pleadings ought to be true.* Notwithstanding this rule, the practice has grown up of admitting certain *sham pleadings* that are interposed for the purposes of delay. The most common of these is the plea of *judgment recovered*. But no sham pleas will be admitted unless they conform closely to a pretty limited and narrow range of precedents. When a plea is not in the usual and tolerated form of a sham plea, and the matter pleaded is at the same time very improbable, and presumably intended as a sham plea, the court will, on motion, supported by affidavit showing the falsehood of the plea, allow judgment to be signed for the plaintiff as for want of plea, and make the defendant or his attorney pay the costs. And the court has, in all cases, power to punish for sham pleading, and has often strongly censured the practice.

But this rule does not extend to the various fictions which have been established in connection with pleading, for the promotion of justice.

QUESTIONS.

The questions are numbered to correspond with the sections in this book. The answers and references for further study may be obtained by referring to the corresponding sections.

LAW OF REAL PROPERTY.

Chapter I.

1431. What may be said as to the division of property into *movable* and immovable? What is the basis of the American law of Real Property?

1432. Describe the origin of the terms "real property" and "personal property."

1433. What is the distinction between real and personal property?

1434. What is meant by corporeal and incorporeal property?

1435. Explain the use of the words "messuage," "tenement," "land."

1436. Name some of the authorities on Real Property law.

Chapter II.

Of an Estate for Life.

1437. Explain fully the origin of an estate for life.

1438. Describe and explain what is meant by an estate "*per autre vie*."

1439. What is meant by a "freehold estate"? What were the rights of a tenant for life?

Chapter III.

Of an Estate Tail.

1440. Describe and explain an "estate tail." Into what classes are estates tail divided? Explain the meaning of each.

1441. Explain the early history and construction of an estate tail.

1442. What was the purpose of the Statute "De Donis Conditionalibus?"

1443. Explain the origin of "common recoveries" and the decision in *Taltarum's Case*.

1444. What exceptions were there to the right of the tenant in tail to bar the entail?

1445. Name and explain the right of a tenant in tail.

Chapter IV.

Of a Fee Simple Estate and the Rule in *Shelley's Case*.

1446. What is meant by an estate in "fee simple?" What restraints may be placed upon the alienation of such an estate?

1447. Explain fully the origin and effect of the rule in *Shelley's Case*.

1448. Mention four cases to which the rule in *Shelley's Case* does not apply.

1449. Explain the first two exceptions to the application of the Rule in *Shelley's Case*.

1450. May the effect of the word "heirs" be changed by explanatory words?

1451. Why does the rule in *Shelley's Case* not apply when the inheritance is grafted on the heirs?

1452. Mention other examples where the rule in *Shelley's Case* does not apply.

1453. What may be said as to the rule in *Shelley's Case* being abrogated by statute?

Chapter V.

Of Reversions and Remainders.

1454. Explain the meaning of a "reversion."

1455. What is meant by a "remainder?"

1456. What was the process of conveying a reversion or remainder at common law?

1457. What is the requirement as to when the seizin of a subsequent estate must take effect?

1458. What is the rule as to the kind of an estate necessary to support a freehold remainder?

1459. Explain fully the meaning of "vested" and "contingent" remainders. Give examples.

1460. What is the rule as to construing a grant which creates a vested or contingent remainder?

Chapter VI.

Of Estates Upon Condition.

1461. What is meant by an estate upon condition?

1462. Into what classes are conditions divided? Explain them.

1463. What is meant by a rule of property? Give examples, and explain why a condition subsequent must not violate them.

1464. To what extent may the use of land be restricted in the grant? Give examples.

1465. How is an estate upon condition distinguished from an estate upon conditional limitation?

1466. How is a condition distinguished from a trust?

1467. Explain the nature of an estate upon condition.

1468. What is the nature of an estate upon conditional limitation?

1469. How is the estate over in a conditional limitation distinguished from a remainder?

1470. How does an estate upon conditional limitation differ from an estate tail?

1471. Explain and discuss the meaning and effect of an executory devise.

1472. Explain the effect of a conditional limitation in which the entire estate does not go over to a third person.

1473. Explain how a will may be drawn, giving the devisee the right to sell, and yet have the remainder go to a third person.

1474. Explain the rule against perpetuities, and when it is violated by executory devises.

1475. Is an executory interest that may possibly contravene the rule against perpetuities valid? Explain your answer.

1476. Does an estate upon condition violate the rule against perpetuities? Why?

1477. Give some of the common examples when an executory devise will be held void.

1478. How is a conditional limitation created?

1479. What is the effect of the breach of the condition in a conditional limitation?

1480. What is the rule against perpetuities at present?

1481. Mention some grants that are not repugnant to the rule against perpetuities.

Chapter VII.

Limitations to Classes of Persons.

1482. Explain what is meant by a gift to a class.
 1483. In determining the validity of a gift to a class, what conditions govern?
 1484. Give the six rules for determining the validity or invalidity of devises to a class.
 1485. Mention and discuss the rules for determining when the class is closed.

Chapter VIII.

Of the Mutual Rights of Husband and Wife.

1486. What are the classes of estates which the law creates for the benefit of the family?
 1487. Define and explain the estate of dower.
 1488. How many essentials to the estate of dower? Explain each.
 1489. What are the nature and incidents of a dower estate before it has become vested? Explain fully.
 1490. May a wife release her dower to her husband? How?
 1491. To what does the estate of dower attach?
 1492. What may be said of the nature and quality of the estate subject to dower? Does dower attach to an estate acquired by exchange?
 1493. In what ways may lands be discharged of the right of dower?
 1494. May there be dower out of dower?
 1495. Define and explain the meaning of an estate by curtesy.
 1496. What may be said as to the existence of curtesy in the United States?
 1497. In what two stages does the estate by curtesy exist? Describe each.
 1498. What are the essentials to the creation of an estate by curtesy?
 1499. To what estates does curtesy attach?
 1500. May the estate by curtesy be barred by will?
 1501. How may an estate by curtesy be barred when lands are conveyed in trust to uses?
 1502. What are the leading incidents of an estate by curtesy?

Chapter IX.

Of Joint Tenants and Tenants in Common.

1503. Describe and explain what is meant by an estate in joint tenancy.

1504. Describe the incidents arising from an estate in joint tenancy. What is the estate of each tenant?

1505. How may an estate in joint tenancy be severed?

1506. What is the general effect of modern statutes upon estates in joint tenancy?

1507. What is meant by tenants in common? How do such tenants hold?

Chapter X.

What Passes With a Grant of Land.

1508. In general what does the term "land" include?

1509. Explain the incidents that pass with a grant of minerals.

1510. How are standing forest trees classed?

1511. How are nursery trees and shrubbery classed?

1512. Explain and discuss the law applicable when a tree extends over the property line.

1513. How is manure classed at common law? Why.

1514. To whom do alluvion deposits belong?

1515. To whom do aerolites belong?

Chapter XI.

Of the Annual Products of the Land.

1516. Into what two classes are the products of the soil divided? Of what does each class consist?

1517. What rules govern as to natural fruits of the soil?

1518. How are annual crops or emblements regarded?

Chapter XII.

Of Rights and Interests Appurtenant to Land.

1519. Explain the difference between things which are "appendant" and those which are "appurtenant" to land.

1520. What may be said as to the nature of things which may be appendant or appurtenant to land?

1521. Explain the meaning that will be given the term "appurtenant."

QUESTIONS

Chapter XIII.

Sources of Title to Land in the United States.

1522. What land passed to the United States on the acknowledge of Independence?

1523. Mention the various purchases and acquisitions of land by the United States.

1524. Discuss the rights of the Indians to land in the United States.

1525. What may be said of the relation between the Indian tribes and the Federal government?

1526. What may be said as to title by right of discovery?

1527. What was the title to land under Colonial Charters?

1528. What lands were ceded to the general government by the States?

1529. Explain the survey of the Public Lands.

1530. What may be said as to the rights of Riparian owners?

1531. How are sales of the public land effected?

Chapter XIV.

Covenants of Title.

1533. Explain what is meant by covenants, and name the various kinds of covenants usually found in a deed of land.

1534. Define and explain what is meant by title to land.

1535. Discuss fully the covenant of seizin.

1536. What do you understand by the covenant of the right to convey?

1537. Explain the covenant against incumbrances.

1538. What is included in the term "incumbrance"?

1539. What is the effect of the breach of the covenant against incumbrances?

1540. Discuss fully the covenant for quiet enjoyment.

1541. What is meant by the covenant for further assurance? What is the effect of this covenant?

1542. Define and explain the covenant of warranty.

1543. Discuss "general" and "special" warranties.

1544. What is necessary to constitute a breach of the covenant of warranty?

1545. To what parties does the covenant of warranty extend?

Chapter XV.

Recording of Deeds and Mortgages.

1546. Would it be necessary to record deeds and mortgages independent of statutes?

1547. Where are the records of deeds and mortgages, and the other records affecting title to land kept? How are they entered?

1548. What is the effect of a mistake in the records?

1549. How is proof of title made from the records?

1550. How does the recording laws effect the title of subsequent purchasers?

1551. How is a mortgagee regarded under the recording laws?

Chapter XVI.

Of Abstracts of Title.

1552. Why is the subject of abstract of titles important?

1553. What may be said as to the utility of abstract offices?

1554. Explain and discuss the method of examining titles.

1555. What is the liability of an examiner of titles for mistakes and errors therein?

BOOK II.THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS
AT COMMON LAW.

Chapter I.

The Subject Introduced.

1556. What may be said as to the importance of the study of the English common law pleading?

1557. How are rights enforced? What rights has an individual to enforce rights by "self-help"?

1558. What is the means of redressing wrongs or applying remedies when the operation of law is necessary?

1559. Explain what is meant by a "court of record."

1560. Mention and describe the constituent elements of a court.

1561. What sort of judicial machinery existed under the Anglo Saxons?

1562. What change in the system was made by the advent of the Normans into England? Explain fully.

1563. Discuss the origin of the Court of Exchequer.
 1564. When and how did the institution of Justices in Eyre and Assizes come to be introduced?
 1565. What was the origin of the Court of Common Pleas, or Common Bench?
 1566. Explain the origin of the Court of King's Bench.
 1567. What was the jurisdiction of the Court of King's Bench?
 1568. What was the jurisdiction of the other English Courts?
 1569. Explain the consolidation of the English Courts by the Judicature Act of 1873.
 1569a. How are courts organized in the United States?
 1570. Explain each of the various kinds of jurisdiction.
 1571. What may be said as to the scope of the subject of Pleading?
 1572. Mention some of the authorities on the subject of Pleading.

Chapter II.

Of Forms of Action at Common Law.

1573. What is the general classification of actions at common law?
 1574. Define "real action," "personal action," "mixed action."
 1575. Explain the various kinds of real actions.
 1576. What were the kinds of mixed actions?
 1577. What were the ancient personal actions?
 1578. Discuss fully the early common law action of debt.
 1579. Explain the origin and purpose of the early action of detinue.
 1580. What may be said of the action of covenant at common law?
 1581. How was the action of "account" employed?
 1582. What was the use of the writ of *scire facias*?
 1583. Discuss the action of trespass, as a formed action. What division of the actions of trespass was there at common law?
 1584. Explain the purposes for which the action of replevin was employed.
 1585. What may be said as to inadequacy of the formed actions?
 1586. What was the purpose and effect of the Statute of Westminster II?

1587. Explain the origin and use of the action of trespass on the case.

1588. Explain the origin and use of the action of assumpsit. What is meant by general assumpsit, or the "common counts"? What could be recovered under the common counts?

1589. Explain the origin and use of the action of Trover.

1590. Explain the early origin and use of the action of ejectment. How and why did the action come to be employed to try title to land? Explain fully.

1591. What was the effect at common law of making a mistake as to the kind of action to bring?

1592. Mention the extraordinary actions.

1593. What is meant by the action or writ of mandamus?

1594. Explain what is meant by the writ of procedendo.

1595. For what purpose was the writ of prohibition used?

1596. What is the use of the writ of quo warranto?

1597. What was the use and purpose of an "information" in England?

1598. For what is the writ of Habeas Corpus used?

1599. Explain the purpose and use of the writs of certiorari and error.

Chapter III.

Of the Joinder and Election of Actions.

1600. Explain what counts might be joined and what might not be joined in the same action.

1601. Explain how and why it might be advisable for a party to choose a particular action in preference to another.

1602. Might a pleader abandon one action and resort to another?

Chapter IV.

Of the Full Proceedings in an Action at Law.

1603. What do the proceedings in an action at law include?

1604. What is the meaning of process? How many kinds of process? Explain each.

1605. Discuss and explain fully the use of the original writ as a mode of commencing an action.

1606. Explain the various kinds of original process at common law after the summons. In what courts might a party be sued without original writ?

1607. What process issued to institute a suit in the United States?

1608. What may be said as to the "appearance" of the defendant? What is the distinction between a general and special appearance?

1609. What is the general purpose of the pleadings? How were they noted?

1610. What duty did the court have in directing the pleadings?

1611. What was the first pleading called? What did it contain?

1612. Explain and discuss the formal conclusion of the Declaration.

1613. If the declaration was insufficient in law, how could it be tested? What kinds of demurrers?

1614. What is the answer of the defendant to the declarations called? Give the classification of pleas.

1615. Explain full the purpose and object of a dilatory plea. What is the effect if the dilatory plea is sustained?

1616. What is meant by peremptory pleas? What kinds of such pleas?

1617. What is meant by a plea by way of traverse? What was the formal tender of issue in such a plea?

1618. What are the other pleadings on the part of plaintiff and defendant that may be used to arrive at an issue?

1619. What other pleadings of occasional occurrence at common law may be mentioned?

1620. What was the "paper-book" or "demurrer-book"? How was it made up?

1621. What were the various kinds of trial at the early common law?

1622. Discuss the origin of the trial by jury.

1623. What is the process of submitting the facts to the jury? How must the verdict be given?

1624. What is meant by a variance. What is the effect of it?

1625. What is done with the verdict when given by the jury?

1626. How are exceptions taken, and how is the bill of exceptions made up?

1627. What is meant by demurring to the evidence? What issue does it raise?

1628. When is judgment rendered? What steps may be taken before judgment is entered?

1629. In general how is a motion for a new trial supported?
1630. What are the grounds upon which a motion in arrest of judgment may be made?
1631. When should a motion for a verdict "non obstante" be made?
1632. When should a motion for repleader be made?
1633. When will a *venire facias de novo* be awarded?
1634. What is the form of a judgment on a dilatory plea? On the other issues of law or fact?
1635. What is the purpose and effect of the writ of execution?
1636. Explain the forms and purpose of writs of error.

Chapter V.

Of the Rules of Pleading.

1637. What are the general objects of rules of pleading? Give the classification of the rules of pleading.
1638. What is the first rule looking to the production of an issue of law or fact?
1639. When is it proper to demur? Explain the nature and properties of general and special demurrers.
1640. What is the effect of pleading over without demurring?
1641. What may be said as to electing whether to demur or plead?
1642. What classification is made by Stephen under the head of pleadings in general?
1643. What is the form of a common traverse? What is meant by a general issue traverse?
1644. What is the effect of pleading the general issue in the various actions?
1645. What is meant by a special traverse, and when might such a traverse be desirable?
1647. What are the necessary parts of a special traverse? What is the answer to a special traverse?
1648. Discuss the rules or principles applicable to traverses in general.
1649. What is meant by pleas in confession and avoidance? How are they divided? What is meant by giving color, explain fully?
1650. Discuss and explain the principles and properties of pleadings in general.
1651. What is the second general rule of pleadings? What

is the formula for the defendant concluding to the country?
For the plaintiff?

1652. What is the third rule of pleading?

1653. Mention and discuss the rules which tend to secure the materiality of the issue.

1654. What is the first rule tending to produce singleness or unity in the issue?

1655. Explain the purpose of several counts, to avoid the rule of pleading as to unity in the issue.

1656. Why is it not rulable to plead and demur to the same matter?

1657. What is the first rule tending to produce certainty or particularity in the issue?

1658. Mention and discuss the second rule to produce certainty in the issue.

1659. Mention and discuss the third rule to produce certainty.

1660. Mention and discuss the fourth rule to produce certainty.

1661. Mention and discuss the fifth rule to produce certainty.

1662. Mention and discuss the sixth rule to produce certainty.

1663. What is the seventh rule to produce certainty in the issue?

1664. Explain and discuss the limitations on the seven rules to produce certainty in the issue.

1665. What is the first rule to prevent obscurity and confusion in pleading?

1666. What is the second rule to prevent obscurity and confusion?

1667. Explain the third rule to prevent obscurity and confusion?

1668. Explain the fourth rule to prevent obscurity and confusion?

1669. What is the fifth rule to prevent obscurity and confusion?

1670. What is the sixth rule to prevent obscurity and confusion?

1671. What is the seventh rule to prevent obscurity and confusion?

1672. Give and explain the eighth rule to prevent obscurity and confusion in pleading.

1673. Give and explain rule nine to prevent obscurity and confusion.

- 1674. Give and explain rule one tending to prevent prolixity and delay.
- 1675. Give and explain rule two to prevent delay.
- 1676. Explain rule three regarding prolixity and delay.
- 1677. Give and explain the eleven miscellaneous rules of pleading.

ABBREVIATIONS.

(SEE ALSO THE ABBREVIATIONS GIVEN IN PREVIOUS NUMBERS.)

Atk.—Atkyn's Reports, English Chancery.

Am. Dec.—American Decisions Reports.

Beav.—Beavans' Reports, English Rolls Court.

Co. Litt.—Coke on Littleton.

Cox—Cox's Reports, English Chancery.

Cox. C. C.—Cox's Criminal Cases, English and Irish Courts.

Cowp.—Cowper's Reports, English King's Bench.

Doug. or Dougl.—Douglas' Reports, English King's Bench.

Foster—Foster's Reports, English Courts.

Real. Prop.—Real Property.

L. R. A.—Lawyers' Reports Annotated.

M. & K. or Myl. & K.—Mylne and Keen's Reports, English Chancery.

N. Dak.—North Dakota Reports, Supreme Court.

Ohio St.—Ohio State Reports, Supreme Court.

Plowd.—Plowden's Commentaries or Reports, English Courts.

Purd. Dig.—Purdon's Digest, Pennsylvania Laws and Reports.

Shep. Touch.—Sheppard's Touchstone.

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